Supreme Court of the United States

OCTOBER Term, 1940

No. 332

Petition For Certiorari

J. W. KOHN, M. S. KOHN, AND J. W. KOHN, Administrator of the Estate of Carrie Kohn, deceased, and CENTRAL DISTRIBUTING COMPANY, INC., (A Defendant).

Petitioners

vs.

CIRCUIT COURT OF APPEALS for the SIXTH CIRCUIT, with direction to the UNITED STATES DISTRICT COURT for the Eastern District of Kentucky, and J. W. MARTIN, et al.,

Respondents

Petition for Writ of Certiorari to the Sixth Circuit Court of the United States, with directions to the United States District Court for the Eastern District of Kentucky.

Case of J. W. Kohn, et al., vs. Central Distributing Company, Inc., and J. W. Martin, et al, pending in the United States District Court for the Eastern District of Kentucky.

Cross-Appeal of Central Distributing Company, Inc., for Writ.

The Plaintiffs join in this Petition for the writ.
(Former Appeal No. 177.)

(The law for this Application is U. S. Code 237 (b) 28 U.S.C. 344-7

HARVEY H. SMITH,
Attorney for J. W. Kohn, et al

FRANK M. DAILEY,
Attorney for Central Distributing Company, Inc.

INDEX STATEMENT OF JURISDICTION BRIEF AND EXHIBITS

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Paragraph 2, page 2:

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Paragraph 5, page 5:

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Paragraph 8, page 6:

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STATEMENT AND BRIEF

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Page 13 — Paragraphs 17—18.

The above covers question of jurisdiction of both the Circuit Court of Appeals and United States District Court for the Eastern District of Kentucky.

BRIEF

Page 13 to 39, inclusive presents record evidence as part of petition and affidavit now made part of the record in the Circuit Court of Appeals.

Exhibits A to Q, pages 40 to 47. Examine these exhibits for explanations of allegations of petitioners. At page 47, sworn statement of supervisor of taxes of Kentucky.

CONCLUSIONS OF LAW

a. Judgment that adequate remedy existed April 16, 1938, is the law in this case.

b. Case stands undisposed of as of record, April 11, 1938.

c. Order of Judge Feb. 27 void for many reasons.

d. Plaintiffs judgment by default must be entered and issue of damages and amount of taxes only determined by jury.

Supreme Court of the United States

——— Term, 1940

No. ———

Petition For Certiorari

J. W. KOHN, M. S. KOHN, J. W. KOHN, Adminstrators of the estate of Carrie Kohn, deceased and Central Distributing Company, Inc. (A Defendant.)

Petitioners,

PETITION for Writ of Certiorari to the Sixth Circuit Court of the United States, with directions to the United States District Court for the Eastern District of Kentucky

vs.

CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, with directions to the UNITED STATES DISTRICT COURT for the EASTERN DISTRICT OF KENTUCKY, and J. W. MARTIN, et al.

Respondents

CASE OF J. W. Kohn, et al., vs. Central Distributing Company, Inc., and J. W. Martin, et al., pending in the United States District Court for the Eastern District of Kentucky.

CROSS—Appeal of Central Distributing Company, Inc. for Writ.

To The Honorables: *The Judges of the Supreme Court of the United States.*

1. This is an action for a writ of Certiorari in a cause, wherein J. W. Kohn, et al., are Plaintiffs, and J. W. Martin, et al., are Defendants, in the United States District Court for the Eastern District of Kentucky, which said court denied appeal to the Circuit Court of Appeals for the Sixth Circuit, and which Circuit Court of Appeals denied, on May 14, 1940, a petition to allow an appeal in this action to that court to review an order of the United States District Court for Eastern District of Kentucky, which court refused to docket and try the merits, pending in said Court, in the cause of J. W. Kohn, et al., vs. Central Distributing Company, Inc., and J. W. Martin, et al., co-defendants, and the Circuit Court of Appeals also denied appeal and Mandamus.

2. This application is made by the Central Distributing Company, Inc., in its own behalf, because the Plantiffs are about to sue and recover against the petitioner the sum of three thousand and fifty-five dollars and interest since February 9, 1937, secured by mortgage, duly recorded at all times hereinafter alleged, which mortgage consideration and note executed at said time, your petitioner has admitted was duly executed for a valuable consideration and not paid, and for the further sum of about twenty-two thousand dollars unsecured, owing by petitioner to said plaintiffs for money borrowed and for which claims due, your said petitioner duly assigned all right and title to the assets held by a Trustee in foreclosure on February 16, 1938, and which sum of twenty-two thousand dollars and interest is due the said plaintiffs and unpaid, and who are now about to sue this Petitioner, who asks that, in the above cause the right to recover from J. W.

(NOTE:—Words in parenthisis not quotations.)

Martin, Revenue Commissioner for the state of Kentucky who has unlawfully recovered said sum into his possession, and now holds by attachment and unlawful seizure, all of said sums, but under the laws of Kentucky where an issue is undetermined in an injunction suit, action may be maintained on the merits. And property under control of a Trustee is exempt from attachment.

3. That the Plaintiffs, J. W. Kohn, et al., have agreed to join in this petition in order to force the United States District Court for the Eastern District of Kentucky to docket and try all of said litigated issues set out in their said petition, by proper order of this cause, to the Sixth Circuit Court of Appeals of the United States, which shall be docketed and tried according to law, and that by decree the said United States District Court aforesaid be required to vacate the order refusing trial of this cause entered on the 27th day of February in chambers (1940), denial of trial of the issues, and its order refusing to hear and determine motion for judgment filed by Plaintiffs, April 11, 1938, on which evidence was introducted and no decision rendered by said District Court, as required by law and the rules enacted by this Court for the trial of causes in the said District Court. And also to sustain the Plaintiffs' motion for a summary judgment filed in this cause on the 9th day of February, 1940, and denied by the said District Court.

Said Trustee in charge of attached property not being a party to the suit in the Federal or State Court, not served and not intervening.

4. That in the month of May in 1937, your petitioner, Central Distributing Company, Inc., and the plaintiffs, J. W. Kohn, M. S. Kohn, and J. W. Kohn, Administrators of the estate of Carrie Kohn; (your petitioner being unable to pay said indebtedness to J. W. Kohn, et al.,) entered into an agreement whereby Harry Bayer was to act as Trustee, and was thereby, under the terms of said agreement, placed in charge of said business until the expiration of the license period, the first day of July, 1938. That at the time of the attachment of James W. Martin, which writ was attempted to be served upon your petitioner, Central Distributing Company, Inc., this mortgage was duly recorded in Campbell County in its book of Chattel Mortgages, No. 18, page 491, file 977, said mortgage having been executed on the 9th day of February, 1937. That at the time of the levy of the attachment of the said James W. Martin Harry Bayer was the acting Trustee to administer the assets of said corporation, which were attached, and whose business was closed by action of the said James W. Martin, then Revenue Commissioner of Kentucky, wholly without authority, and seized wholly without legal authority.

5. That thereafter, on the 24th day of February, 1938, J. W. Kohn, et al., filed their suit in the United States District Court for the Eastern District of Kentucky, and duly served the Central Distributing Company, Inc., and the said James W. Martin, then Internal Revenue Commissioner of Kentucky. But the said Harry Bayer, Trustee of said assets, was not served and did not appear as a party to this action, nor did he appear as a party to the attachment action sued out by James W. Martin, on the

16th of February, 1938, nor has he in said capacity ever been a party to either of them. That after J. W. Kohn, et al., brought their action in the United States District Court for the Eastern District of Kentucky, and served the said James W. Martin, the said J. W. Kohn, et al., were made parties to said state action on the application of the said James W. Martin, by amended petition and by order of the Franklin Circuit Court of Franklin County, Kentucky.

6. That the service on the said J. W. Kohn, et al., was by service on Henry Cook, attorney for petitioner, the said J. W. Kohn, et al., being citizens of Ohio, and out of the jurisdiction of the court. That insofar as the Central Distributing Company, Inc., is concerned and interested in this action, it alleges and says, that J. W. Kohn, et al., were not served as provided by the laws of the State of Kentucky, and that they filed their special appearance in the said action, pending in the State Court, long after the suit in the United States District Court had been filed and James W. Martin had been served, and it alleges no service can be had or was had on counsel or J. W. Kohn, et al., that will be binding upon your petitioner, Central Distributing Company, Inc., nor was any action taken in that cause against the said J. W. Kohn, et al., that would be valid and binding upon the said J. W. Kohn, et al., because of the pending action in the United States District Court for the Eastern District of Kentucky, which action was filed prior to the state action ,and pleaded as a bar, and constructively the said District Court had judicial possession of the res. That at said time the requisite diversity of citizenship existed, and the said Harry Bayer, a citizen of Cincinnati, Ohio,

Trustee was not made a party to the action either in the United States District Court, or in the state court of Kentucky.

7. That no service whatsoever was had upon Central Distributing Company, Inc., at its place of business in Campbell County, Kentucky, nor on any officer, nor on its service agent, which is required under the practice Code of Kentucky, and the provisions of which Code were binding on the United States District Court for the Eastern District of Kentucky, at all times under the decisions of the Erie Railroad vs. Thompson, a cause rendered by this court.

At the time of the seizing of the res, there was due from your petitioner to the said J. W. Kohn, et al., approximately $3500.00 in principal, more than the jurisdictional amount required to give the United States District Court for the Eastern District of Kentucky, complete jurisdiction of the res and of the cause of action.

8. That on the 11th day of April, 1938, while said James W. Martin was in default, the plaintiff in this action moved for judgment on the record, and furnished evidence, and your petitioner, by its attorney, Henry J. Cook, joined in said motion, which has never been disposed of. That at said time, and at this time, the law of Kentucky, was as follows:

> "For in every case where a mortgage was given before the litigation against the mortgagor (Central Distributing Company, Inc.) was instituted, the mortgagee is entitled to have a decision on his rights rendered, on the basis of the facts and considerations adduced by him (or

them). Obviously, the facts and considerations affecting the trustee, his rights, may be different from those presented to the state court on behalf of the company, because there is a diversity of citizenship, (and was then), the trustee under the mortgage is entitled to have his rights adjudicated and determined." (In the Federal Court). But neither of the Respondent Courts would make findings on such rights.

This also was the binding law under the decisions of the Supreme Court of the United States, as decided in Chase National Bank vs. Norwalk, 291 U. S. 439, and other causes.

9. Therefore, your petitioner alleges that these rights of the said Harry Bayer, Trustee, must be determined under the laws of Kentucky, he being an actual party in interest and without his presence in the court, under the Code of Kentucky, no valid judgment could be rendered against the assets or against either party to this action, and said order of February 27, 1940, is a denial of due process.

10. That the action of the court impaired the contract between your petitioner, Central Distributing Company, Inc., and J. W. Kohn, et al., and destroyed the assets of said contract of said mortgage, rendered recovery impossible, and voided the agreement between your petitioner and the said J. W. Kohn, et al., contrary to the 14th Amendment of the Constitution of the United States. Actually destroyed the assets without due process. Petitioner alleged through motion for judgment, and findings were filed, but neither court would make them.

That certain evidence was produced and before said court, relating to the amount of alleged import

taxes due, and other litigated and disputed matters, and Plaintiffs filed their said demand for hearing and for judgment by default, all of which said District Court refused to hear and determine, and refused to hear and determine a Bill of Exceptions, or make a final order so that appeal could be taken.

11. That your petitioner cannot be exonerated from said obligations until the merits of the action have been determined, being a guarantor of their payment, and said merits of said action will not be determined, and have not been determined by the United States District Court; which recently, on or about the 14th day of May, 1940, refused to make an order allowing said appeal, and the said Circuit Court of Appeals for the Sixth Circuit refused to grant an order allowing appeal, or mandamus, and your petitioner will therefore be denied a hearing in said cause, and will have had no adequate remedy at law, which a three judge court, sitting at Louisville, Kentucky, April 16, 1938, said, petitioners and parties-litigant were entitled to, and did there and then deny a temporary injunction on the *sole ground that such right was certain and adequate.* That there is now due about $34,000 to plaintiffs, and the said J. W. Martin and the Commonwealth of Kentucky have and hold assets of about $29,000 principal sum, and about five thousand dollars in interest, for which, under said mortgage executed and assignment made by defendant, Petitioner, here, alleges would, if paid to Plaintiffs, entirely extinguish and pay said debt of Petitioners.

THE GROUNDS HEREIN ALLEGED FOR THE WRIT ARE AS FOLLOWS:—

1. The Sixth Circuit Court of Appeals errored in not ordering, under a writ of Mandamus denied May 15, 1940, to the said Mac Swinford, applied for the restoration of said cause to the trial docket, that the facts therein be disclosed and the merits tried; and from this cause (177) in this court, issued its mandate, which under this action ought to be set aside and relief granted accordingly, and said decree entered April 16, at Louisville, Kentucky also vacated.

2. That the order entered April 16, 1938, being rendered over the objection of Plaintiffs, and your petitioner, out of the United States Circuit Court of Eastern District of Kentucky, was a void judgment of dismissal, no power being conferred by law to hold a legal session of a three judge court out of the territorial limits of the District, and no order of dismissal allowable to said three Judges by law.

3. That no issue was determined there except that the Plaintiffs were not entitled to a temporary injunction as prayed, this being the only issue referred to said three judges, and over which, as matter of law, they could only have jurisdiction; and that as decided, Plaintiffs had an adequate remedy at law, by pending suit in the United States District Court for the Eastern District of Kentucky, which the said Plaintiffs sought to have enforced before the said District Court, and which was on the 27th day of February, 1940, denied by order of Court, attached as Exhibit A.

4. That the effect of said Chamber's order was to deny to your petitioners the right of trial by Jury, and to the Plaintiffs said Constitutional right of Jury trial—Amendment 7, (U. S. C.)

5. That the refusal to sustain the motion for judgment on April 11, 1938, which was joined in by your petitioner, was to determine its liability and its rights in the merits of the action.

6. That it is the first duty of a Federal trial court to determine if any service has ever been had on the parties when a party's property is seized; it to determine whether service was had by any process on any officer of a corporation or according to law; and it was here the duty of said District Court to determine this fact according to the process-service laws of Kentucky; but the said District Court refused so to do, and by its action deprived your petitioners of a trial, and the mortgage note payment, admitted to be valid, and the assignment of import and other unlawful taxes admitted to have been paid by your petitioner; and refusal to determine in this cause the amount of said taxes so paid, since it had been decided that they, the said taxes, were invalid; but whether valid or not, your petitioner had a right, as a cross-action defendent to have said facts determined in a trial of common law issues.

That the common law has been adopted and exists in Kentucky, and did so exist at said time.

That said import taxes collected of your petitioner, were collected by the said J. W. Martin, before movement of the merchandise, and the highest court of

Kentucky has held that taxes on imports collected before arrival of merchandise is void, or collected while merchandise is in transportation is also void, repugnant to Article 1. section 8, Constitution of the (United States).

7. That the trial of any issue of fact must be tried to a jury under the Constitution of Kentucky, and no waiver of this constitutional right has ever been made by petitioners but demanded.

8. The District Court errored in denying Plaintiffs motion for Summary Judgment when parties defendant were in default, entirely for over a year, of pleading, and were under the rules barred after six months to plead or raise any issue in the cause in which petitioner joined.

9. Being in default, when motion for summary judgment was filed, defendant had no rights in the matter, and a jury should have been called to decide the damages which had not been waived but demanded.

10. Only a matter of law remained, and a summary judgment was a matter of right, but denied.

11. The Act of 1936, April 30, provided for a payment of an excise tax of 5 cents per gallon to a manufacturer in Kentucky, and if liquors were shipped out of the state and shipped back into the state, it should pay said excise tax the second time, though said act also provided that no gallon of whiskey should pay a tax more than once; and a part of the taxes here claimed by defendant were such import taxes.

12. The tax collected of Petitioner was partly for imports, paid before shipment and said Act of April 30, 1936, here imposed, violated section 8, Article 1, of the Constitution of the United States, and this sum amounted to approximately twelve thousand nine hundred eighty dollars, and this issue on the merits was denied by the order of the District Court.

13. That other assigned taxes amounted to eleven thousand dollars, due to the assignor before suit filed February 24, 1934, also collectable, the said District Court denied a hearing on these taxes altho by law authorized to be sued for in a Federal Court.

14. That twenty-seven thousand dollars of taxes were due petitioner by assignment, re-assigned to plaintiffs, collected in violation of section 171, 172 and 174 of the Constitution of Kentucky, which issue was not denied by answer.

15. The constitution of Kentucky, section 3 Bill-of-Rights, prohibits collection of taxes on property outside of the territorial limits of the state, and all property must be assessed on its fair cash value, personal and real, and liquors are defined by statute in Kentucky as personal property. Property must be assessed in uniformity, without discrimination, and within the limit of confiscation; the Act of April 30, 1936, was repugnant to these provisions.

16. Motion for new trail and motion to vacate Order of District Judge were denied, Bill of Exceptions disallowed and filing of pleadings disallowed, a denial of due process and equal protection of law, Amendment 14.

17. That the United States Federal Court ruled, and section 780, J. C. provide that after default in pleading for six months, no leave shall be granted a party to plead. Under this rule all of the defendants were in default, except this petitioner, whose motion for judgment was still pending and unacted upon by the court. This motion should be sustained by this Court with allowance for attorneys fee.

18. Judgment by Confession on motion of Plaintiffs should have been sustained or denied on the above grounds, and because of the Act of 1934, with penalties had been repealed.

STATEMENT - BRIEF

1. In this petition, J. W. Kohn, et al., join, by Harvey H. Smith, attorney, Central Distributing Co., Inc., by Frank M. Dailey.

2. This application is made by the Central Distributing Company, Inc., a co-defendant of James W. Martin, Internal Revenue Commissioner, at the time of the filing of the suit of the plaintiffs in the United States District Court for the Eastern District of Kentucky, on February 24, 1938. The applicant, Central Distributing Company, Inc., executed an assignment and a chattel mortgage, valid under the laws of Kentucky, for the sum, altogether, of $25,000.00, $3000.00 of this amount being secured by a chattel mortgage, duly filed in Campbell County, in the State of Kentucky, on February 9, 1937, to secure a note executed on said date for the total of $3000.00 and $55 at six per cent; all of which is on record in the Clerk's office in Campbell County, Kentucky, at all the times

hereinafter mentioned. Thereafter, in 1938, while the Central Distributing Company, Inc., was in default, and had by agreement previously made, agreed upon a Trustee who was in charge of the business of the said Central Distributing Company, Inc., at the date of attachment, which was a wholesale liquor concern, duly licensed under the laws of the State of Kentucky, said assets were exempt from distraint. That on said date, the 16th of February, 1938, the state of Kentucky, by James W. Martin, its Revenue Agent, claimed that the said Central Distributing Company, Inc., was indebted to it under the act of April 30, 1936, a Revenue tax act, in the sum of $3100.00. An attachment was sued out in the Franklin Circuit Court for Franklin County, in the State of Kentucky, to recover said sum, with penalties thereon, and the said writ of attachment was delivered to L. C. Sickmeier, Sheriff of Campbell County, Kentucky. That the Plaintiff, J. W. Kohn, et al., filed their petition on the 24th day of February, 1938, in the United States District Court for the Eastern District of Kentucky. This petition prayed for a temporary injunction to restrain the said James W. Martin from seizing the assets then the possessed property of J. W. Kohn, et al.

3. That the Franklin Circuit Court was wholly without jurisdiction to entertain said cause or issue said attachment writ, under the laws of Kentucky, either of the subject matter or parties.

4. That the penalties placed upon said attachment writ amounted to approximately $1500.00. That these penalties were provided for, under two different sections of Carroll's Statutes in Kentucky, one a

general statute, and the other, under the act of 1936; this being a revenue statute, both penalties were void. The penalty under the general statute, if not void for other reasons, was void because the Constitution of Kentucky provides that when a general act is enacted by the Legislature in respect to any subject matter, no special act can be enacted by the Legislature, so that the provision incorporated as a penalty of twenty per cent under the act of 1936, was void, your petitioner alleges.

5. That no service was ever had on the Central Distributing Company, Inc. The attempt up-to-date, and the action of the Judge of the United States District Court for the Eastern District of Kentucky, denying a trial on the merits of this cause, Februrary 27, 1940, did deprive the Central Distributing Company, Inc., as well as the plaintiffs, of their property, without due process of law. No service was ever had on any officer or the service agent of your petitioner, Central Distributing Company, Inc. As a part of this petition, your petitioner quotes the following writ, which, under the laws of Kentucky, shows no attachment can be sustained, nor has the court jurisdiction to issue any attachment until and when a summons has been issued and served on an officer of a corporation or its service agent. That the certified copy of this attachment is as follows; and shows no summons was so issued:—

"FRANKLIN CIRCUIT COURT

Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue,

Plaintiff,

vs.

Central Distributing Co., Inc.,..... *Defendant*

ORDER OF ATTACHMENT

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Franklin County:

You are hereby commanded to attach and safely keep the property of the defendant, *Central Distributing Co., Inc.,(William Ploss,* 1038 *Monmouth St., Newport, Kentucky—Process Agent.)* in your county, not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff *Commonwealth of Kentucky, etc.* in this action against the said defendant the sum of $4,468.66 with 6 per cent interest *on* $3,191.86 *from November* 8, 1937 and $30.00 for the probable cost of this action; and to summons the garnishees, if any, to answer in said action on the 1st day of next April term of this court, and you will make due return of this order as provided by law.

Witness, KELLY C. SMITHER, Clerk of said Court, this 15th day of February, 1938.

KELLY C. SMITHER, *Clerk.*
By ..... D. C."

Came to Hand Feb. 16, 1938 at 10 o'clock A. M. — LOUIS C. SICKMEIER, *Sheriff.* Campbell County, Ky., By Leroy J. Sendelback, D. S.

It is alleged that this attachment was not served on William Ploss, but on Harry Bayer, no officer of the Corporation.

"Executed the within Attachment this 16th day of February, 1938, by delivering a true copy hereof to *Harry Bayer, manager of Central Distributing Company, being the highest officer found in this county.*

LOUIS C. SICKMEIER, *Sheriff of Campbell County, Kentucky.*

By Louis Ewing, D. S.

4. This writ was served on Harry Bayer, who was neither an officer nor an agent of the Central Distributing Co., Inc. The service agent of said corporation is William Ploss, who resided in Campbell County, and was in Campbell County within the reach of the Sheriff when the writ was executed. His testimony, as recorded and filed in the Circuit Court of Franklin County, between the same parties which is pertinent to this issue, is made part of this petition, and is as follows:

Q. Did you ever sign, negotiate a mortgage with J. W. Kohn, or M. S. Kohn, or J. W. Kohn, as administrator of Carrie Kohn?
A. Oh, Kohn. I didn't understand it before.

Q. Yes, Kohn. K-O-H-N.
A. Why, yes. It was a chattel mortgage.

Q. You did not know the Kohns?
A. Yes, sir, I did.

Q. You did not understand the question before?
A. No.

Q. Where did they live, Mr. Ploss?
A. Cleveland.

Q. Do you know the street address in Cleveland?
A. No, I do not.

Q. (Discussing Mr. Bayer). Was he an officer in the company
A. No, sir. *** I signed the checks.

Q. Did Mr. Bayer have any authority to sign any checks?
A. No, sir.

Q. Who passed on the credit of the customers? Did you pass on it?
A. I passed on it, yes, sir.

Q. Did you take care of the filing of reports,

the necessary export and import forms of the Department of Revenue?

A. That was up to Eleanor Webster. (Vice-President).

Q. Who were the other officers of the company?

A. Eleanor Flannery and Eleanor Webster.

Q. What were their respective positions?

A. Eleanor Webster was Secretary and Treasurer.

Q. How much stock did you have in this corporation?

A. 35 shares. *** I paid cash for it.

Q. Did you take care of the purchasing of stamps, of consumers' stamp tax under the Department of Revenue?

A. Most of the time.

Q. You bought them?

A. Yes, sir. (He was President of the corporation, but he had resigned at the time of the attachment on February 16, and the date of attachment writ).

Q. Did you ever borrow money from the Kohns?

A. Yes, sir.

Q. Did you sign the note as president of the company?

A. Yes, sir.

Q. And to secure that loan you gave them a mortgage that is in the plea?

A. Yes, sir. That's the idea.

Q. What was the purpose of the loan?

A. To use in the business.

(The witness was then shown a paper, Exhibit A, which showed that the corporation had furnished a list of the officers to the Internal Revenue Commissioner, for which the corporation had his acknowledgment.)

Q. Is that a copy of that report? (Exhibit A).

A. Yes, sir.

Q. Did you pay Mr. Bayer a salary for the services that he rendered?
A. Yes, sir."

(The sworn affidavits filed in the case at the time of the application for injunction, by Eleanor Webster and Harry Bayer, are made a part of the record, and are as follows):

"In Franklin Circuit Court,
Franklin County, Kentucky

J. W. Martin, et al.

vs. AFFIDAVIT

Central Distributing Company
Commonwealth of Kentucky
County of Campbell SCT.

Affiant, Eleanor Webster, after being duly sworn, deposes and says that she is director and Vice-President of Central Distributing Company, Inc., a wholesale liquor dealer located at 45 East Eleventh Street, Newport, Kentucky, and that she has occupied that office and position since the formation of the company in July 1936.

Affiant further says that she was in the place of business of said Central Distributing Company, Inc., at 45 East Eleventh Street, Newport, Kentucky, at the time of the service of the attachment on Febraury 16, 1938, on the property of Central Distributing Company.

Affiant has read the foregoing affidavit and avers that it is true in every respect.

ELEANOR WEBSTER,

Eleanor Webster, Vice-President of Central Distributing Company, Inc., 45 East 11th St., Newport, Ky.

Subscribed and sworn to before me this 10th day of November, 1938.

ELSIE M. DEWALD, *Notary Public.*
(SEAL) My commission expires -10-29-40

"AFFIDAVIT

Commonwealth of Kentucky
County of Campbell SCT.

Affiant, Harry Bayer, after being duly sworn, deposes and says that on the date of attachment, February 16, 1938, he was neither director, officer or manager of Central Distributing Company, Inc., but was acting as agent of J. W. Kohn, M. S. Kohn and J. W. Kohn, administrator of the estate of Carrie Kohn, deceased, who held the corporation's promissory note in the amount of Three Thousand ($3000) Dollars, which note was secured by a chattel mortgage on the stock of goods and merchandise, consisting of wines and liquors, the fixtures and all of the assets of said Central Distributing Company, Inc.

Affiant further says that on May 1, 1937, the said J. W. Kohn, M. S. Kohn, and Carrie Kohn had by agreement taken possession of the stock of goods and merchandise consisting of wines and liquors, fixtures, cash register, safes, and all of the assets of said Central Distributing Company, Inc., and simultaneously placed said affiant in charge, as their agent in collecting the amount due them by virtue of said note and chattel mortgage.

Affiant has read the foregoing instrument and avers that it is true in every respect.

HARRY BAYER

Subscribed and sworn to before me this 10th day of November, 1938.

ELSIE M. DEWALD, *Notary Public.*
(S E A L) My commission expires 10-29-40

Bayer was the agent of the Plaintiffs, and had no connection with the company.

5. The return of the attachment writ shows that it was an attachment on the assets of the corpora-

tion, for $4468.65, for the taxes, with interest on principal claim, $3191.89. Section 254 of the Code of Kentucky provides that the property must be described in the attachment, petitioner alleges:

> "The filing of a petition and service of summons on an officer of the corporation or the service agent at or before the filing of the attachment cannot be waived."
>
> Duncan vs. Griswell, 97, Ky. 546.

> "An attachment must be served on an officer of the corporation at its place of business or on the service agent designated by statute (this service agent was William Ploss.) If there is no allegation that a summons has been returned with the endorsement of service on an officer of the corporation or the service agent, attachment is void."
>
> 11 B. M. 669.
> Hearne vs. Hander, 56 Ky. 479
> Section 1358 Carroll's Statutes, and 72nd section of Carroll's Code of Kentucky.

> "In order to acquire jurisdiction, the petition must be filed and summons must issue and be served concurrently with attachment or before attachment."
>
> Sec. 2524 Carroll's Statutes.

Petitioner alleges the attachment was sued out under the act of 1934, because the act of 1934 and the act of 1936 must be considered together for a complete operation of the law. The act of 1934, at the time of the filing of the plaintiffs' action had not been repealed, but was repealed on the 7th day of March, 1938, by the Legislature of Kentucky.

It was the law of Kentucky, at that time, that the penalties were remitted by operation of law.

Speckert vs. City of Louisville, 78 Ky. 88.

To show that the corporation was not served nor the service agent, we quote from the record in said court, and make it a part hereof, as follows:

Testimony of Henry J. Cook:

Q. Did you see Miss Eleanor Webster there that date while Mr. Sam Rosenstein and the Sheriff were there, levying on the merchandise of Central Distributing Co., Inc.? (Miss Webster was Secretary and Treasurer).

A. Yes.

Q. You know both of them, do you not?

A. Yes.

Q. Was H. H. Smith there at that time?

A. Yes.

Testimony of Eleanor Webster, examined by H. H. Smith:

"Q. State your name and residence.

A. Eleanor Webster, 342 Bond St., West Covington, Kentucky.

Q. What was your occupation of February last, about the 16th?

A. I was Vice-President, and active, of the Central Distributing Company at Newport, in Campbell County, Kentucky.

Q. I ask you if you were present on the 16th of February, 1938, when the Sheriff of Campbell County levied on all the merchandise of Central Distributing Co., Inc.?

A. I was there in the office all the time when you and Mr. Cook and the attorney and the sheriff were there, when the levy was made. I helped take the inventory.

Q. Did you see the sheriff and Mr. Sam Rosenstein, the attorney for the state there at that time?

A. I saw all of them. Mr. Rosenstein was the attorney.

Q. Was Mr. William Ploss there at that time or had he resigned as President of the Company?

A. Mr. Ploss had resigned as President, but was still the service agent.

Q. Were you in Campbell County all that day?

A. I was there all day and aided in taking the inventory.

Q. You were not served with any paper or summons on that date or any other date, were you?

A. No, sir.

Q. You were the highest officer, as Vice-President that could have been served that day in Campbell County?

A. I was the highest officer in Campbell County or in the state.

Q. Who did Mr. Harry Bayer represent there that day?

A. Mr. Bayer represented the mortgagee; and he was not an officer or manager of the company.

Q. What was his official position, if any, in the Company?

A. No position with the Company.

Q. You were Vice-President of the Company, and in charge at that time?

A. Yes, sir. I was in charge as Vice-President."

Mr. Ploss concurred in Eleanor Webster's testimony:

"Q. What office if any did you ever hold in that Company?

A. I was President and Service Agent.

Q. Did you have any other position with the Company (on February 16)?
A. Well, just service agent, that was all.

Q. How long have you been service agent and are you still service agent?
A. I am still service agent.

Q. Were you in Campbell County at the time that the attachment was brought up there?
A. I was. Yes, sir."

The testimony of H. H. Smith was to the effect:

"I was present at the time the attachment was served, and the inventory made. Miss Webster was there, the Vice-President of the Company."

Affidavit filed September 26, 1939, which according to the testimony filed with the Internal Revenue Commissioner of Kentucky, the 26th day of June, 1937, is given as follows:

"William Ploss, President, 1036 Monmouth Street, Newport, Ky.

R. Webster, Secretary, 711 John St., Covington, Ky.

E. Webster, Vice-President, 711 John St., Covington, Ky."

The assignment of taxes paid by the company was assigned to J. W. Kohn, et al, for money advanced in the business, for which there was no mortgage. This assignment was executed at the direction of the corporation by Eleanor Webster. The amount alleged at said time to be due from the Commonwealth of Kentucky, as testified to by its supervisor of taxes, was $9039.00. This amount was for the payment to the supervisor of Taxes before the importation of liquors into Kentucky, at the rate of 5c per

gallon. This payment was acknowledged and testified to by Joe Williams, Supervisor of taxes of Kentucky, during the pendency of the injunction suit. The assignment was executed by R. Webster, Secretary of the corporation, to J. W. Kohn, M. S. Kohn, J. W. Kohn, administrator of the estate of Carrie Kohn, on the 4th day of April, 1938.

6. It was the practice of the Supervisor to require your petitioner to purchase permits which permits would give a wholesaler the privilege of importing whiskey into the state of Kentucky. These permits were paid for at the rate of 5c per gallon and prior thereto, certain permits were purchased from other wholesalers to amount of $3100, but the first record permit shown by the books of the state was October 31, 1936. These permits purchased, continue from day to day up to and including April 4, 1938, and as shown by the books of the corporation were $9175.06.

7. Owing to the fact that there was no service of attachment or summons, the then attorney of Central Distributing Co., Inc., Henry J. Cook, made a motion on or about April 4, 1938, in the United States District Court for the Eastern District of Kentucky, which is as follows:

> "Comes now the Central Distributing Co., Inc., by its attorney of record, Henry J. Cook, and moves that its motion to dismiss said attachment be adjudicated by this court, it agreeing that the said note sued on in the sum of $3000 be and is admitted to be a valid mortgage on the assets attached and moves that the court adjudicate the rights of the cross-plaintiffs in respect to the lien claimed by the state of Kentucky, and

also determine what interest, if any, this defendant has in said money assets which cross-plaintiffs claim a lien upon and under an assignment made by it to cross-plaintiffs, before it be required to further plead to this action or file its said answer to the petition of said cross-plaintiffs.

(Signed) Henry J. Cook"

The court refused to pass on this motion. The amount of the taxes in said injunction proceedings were also testified to by Harry Bayer, Joe Williams, State Tax Supervisor, who acknowledged that they had notice of the chattel mortgage in the sum of $3000 (recorded).

"Q. Now, Mr. Bayer, what was your position, if any, with the Company at that time?

A. I was by agreement to serve as bailee and look after and continue the business for the purpose of buying merchandise and selling it, and for the purpose of trying to preserve the business so that they (the company) could pay this note and mortgage out of the profits to be derived."

The witness, John Marcum, testified for the state, and said that the volume of business done per annum amounted to 85,897 cases.

"Q. By whom are you employed, Mr. Marcum?

A. Field Representative, Department of Revenue (Kentucky).

Q. Will you designate by the number of cases, based on the state purchase report?

A. 85,897 cases. We found that he had sold 81,001 cases in export.

Q. What taxes were due on the amount of liquor sold in Kentucky?

A. $15,275.52."

Mr. Philip McGee, as a representative of the Commonwealth, testified to substantially the same thing as the witness, John Marcum.

Mr. Joe Williams testified as follows:

"Q. Now designate in your own way for the record just how you collected that tax, the import tax.

A. Inasmuch as the law provides that a Kentucky importer must pay the import tax and have a permit in his possession before the merchandise is imported, they have adopted a system of having the Kentucky importer purchase permits from the Department in advance, at which time they pay the import tax on the quantity of merchandise called for in the permit. These permits are issued in triplicate, one copy is kept by us, one sent to you, (the purchaser) and the third copy to the out-of-state shipper, depending upon your request. The out-of-state shipper must deliver the copy we send to him, along with the merchandise for transportation, and when the whiskey is imported, is delivered in Kentucky, he must endorse the copy of his permit so as to specify the exact amount of whiskey delivered. Permit may be used until the full quantity called for upon the face of the permit has been shipped. The copy of the permit must be returned to the Department within 90 days.

Q. Did you exercise the authority as a tax board to limit the amount of these permits?

A. No.

Q. Your practice is that the tax in that way, is based upon approximately 5c per gallon, so as to equal the amount of tax. If it should turn out that the tax money would be owing the Central Distributing Co., Inc., (then what)?

A. You are asking me for something that I am not competent to answer.

Q. Are you relying purely upon the tax act itself (1936)?

A. Purely.

Q. The tax act you refer to did not create a wholesaler?

A. No, sir.

Q. So that the license, under the 1934 act exists as a legal entity until the last day of June, of this year?

A. That is right.

Q. In this case here they are seeking to collect penalties of 20% (the statement of J. W. Martin's petition). Is that right?

A. No, sir. The (correct) bill is for 10% under one act and 10% penalty under another.

The Court: Just let him state what penalties were imposed.

Q. The Department imposed a 20% penalty and any additional penalty was charged by him (referring to counsel Mr. Leary)?

A. I passed on neither. That was a legal question."

The penalties therefore, were illegally imposed, whether by Williams, or by Leary, or by Marcum or by McGee. The petition alleges that no penalties can be imposed in Kentucky under the revenue act of the type of the 1936 act. This act, standing alone, was inoperative because there would be no licenses without the act of 1934, which was void because it was a beverage act enacted by the Legislature in violation of amendment 7 of the Constitution of the State of Kentucky, which prohibited the sale of liquor at all as a beverage in Kentucky.

8. The plaintiffs, J. W. Kohn, et al, in this action, sought to have the temporary injunction against J. W. Martin, the then Revenue Commissioner. Although the defendant, J. W. Martin, on April 11, 1938, was in default, the District Court ordered the cause to be transferred to the three Judge court sitting at Louisville, Kentucky—the order signed.

Evidence was introduced in support of the motion for judgment filed by the plaintiffs on the 11th day of April, 1938, in the Eastern District Court. Although the plaintiffs had moved for a three judge court, they, with this defendant, objected to the hearing at Louisville on April 16th, which, among other objections, was that it could not be held outside of the United States District territorial limits of the Eastern District of Kentucky. This exception is found in the original cause filed in the Supreme Court of the United States, in Case 177, the record, at pages 28 and 29 thereof, in language as follows:

"To all of which petitioners object and except."

In said judgment it was distinctly understood and adjudicated that the original motion filed April 11, 1938, had not been determined and would be determined after the issue of injunction was passed upon by the three judge court. This motion is as follows:

> "Come now the petitioners, and move the court for judgment on the amended petition of petitioners, and in this behalf submit evidence.
>
> (Signed) Smith & Schuberth
>
> Henry J. Cook."

The original petition was filed on February 26, 1938. Under the Kentucky laws, plaintiff alleges, the defendant, J. W. Martin and the commonwealth of Kentucky must answer in 21 days, and the amended petition being dated for all legal purposes of the date of the filing of the original petition, the time elapsed was one month and 15 days on April 11th. No leave was ever asked or granted for the defendants, J. W. Martin, to plead. Thus, the default became absolute under the rules of the Supreme Court of the United States and under the procedure rules of the state of Kentucky. In the Kentucky Code, 20 days, and under the rules of the United States Supreme Court, 20 days. Therefore, there was no jurisdiction of the three judge court in the city of Louisville, on April 16, to consider the matter of an injunction.

9. Your petitioner alleges that an appeal was taken from the judgment of that court on April 16, denying the injunction. The motion to dismiss was a demurrer and was not sustained on the ground that the plaintiff's petition did not state a cause of action for the relief asked, but that adequate law-remedy existed—Jurisdiction not there challenged.

10. Plaintiff alleges that the question of consumers taxes levied at $1.04 per gallon, supporting affidavits having been filed in the court, was undetermined and contested as a violation of section 171, 172 and 174 of the Constitution of Kentucky.

That also the constitutionality of the act of 1936, was void as a revenue tax act because it provided for an import tax levied upon merchandise before being moved into the state and during transit, and before

it had been mingled with the assets subject to taxation in Kentucky, under its tax laws, as decided by its courts. The foreclosure of the note and mortgage then remained, under the issue as made by the pleadings, to be determined. That the question of attorney's fees for the plaintiff remained to be determined. And your petitioner alleges that its constitutional rights are invaded because, at the present time, the plaintiffs are attempting to proceed against the collection of approximately the sum of $33,000, and that there is no final judgment which this petitioner can plead in estoppel of said proceedings because no final judgment has ever been entered in this cause, determining the merits.

11. That on the 27th day of February, 1940, the United States District Court for the Eastern District of Kentucky, denied the motion of the petitioners to try the merits of this action and docket the case, under the authorities submitted to the court, that the Central Distributing Co., Inc., as principal, for these issues had never been disposed of, and that the denial of the trial of these issues was a denial of the right of trial by jury, and that the court having never considered, and refused to consider, the service on your petitioner, such denial amounted to a denial of due process of law; and having decided that the plaintiffs had an adequate remedy at law in sustaining the defendants, J. W. Martin's motion to dismiss the petition for want of equity, that this was a decision that the issues mut *be determined at law on the merits.* That no appeal of estoppel was filed in the case because there was no final adjudication of the merits, and no plea of res judicata appeared from the record or was pleaded.

Auditor must be plaintiff to collect taxes. (Sec. 10-1934 Act

12. Notwithstanding motion for findings was filed, the court made no findings. That at the time the plaintiffs made the motion to try this cause on its merits and docket the same, the said J. W. Martin had separated himself from the office of Internal Revenue Commissioner of Kentucky, for longer than six months prior to said hearing, admitted of record, and the court permitted said hearing and participation by the Commonwealth of Kentucky, and J. W. Martin, when under the decisions of the laws of Kentucky, and of the Supreme Court, Rule 25, and under section 780 of the Judicial Code, and decisions of this court, annotated, they could not participate in said trial or the said cause, and were at all times in default, which refusal to sustain findings or make them, and which refusal to strike the names of co-defendants counsel from the cause denied petitioner of due process of law. H.A.C. 764

13. The plaintiff alleges that the refusal of the court to dismiss this action, in respect to the defendants and their pleas was a denial of due process, and a positive refusal of the District Court for the Eastern District of Kentucky, to consider the cause at all in compliance with the Federal Statute designated, and refusal to consider the rules of decision in Kentucky, or the Code of Kentucky, which provide that by operation of the laws of Kentucky, the action could not proceed, and said decision was a denial of the decision of the Circuit Court for the Sixth Circuit, controlling on the said District Court for the Eastern District of Kentucky, and that any judgment rendered by the court, except an ex-parte judgment was void, and must, by operation of law be vacated. That the court thereafter refused to permit

the filing of a summary judgment, which motion for summary judgment is attached hereto, as a part of this record, showing that the seizure of the property was without service of summons or without jurisdiction in the said Franklin Circuit Court, as hereinbefore alleged. That furthermore, the court had refused to adjudicate any question relating to the merits of this action, and that said summary judgment was supported by affidavits showing that said Franklin Circuit Court had no jurisdiction to seize the property.

14. That the plaintiff, J. W. Kohn, et al, became parties to this action, and brought this action in the United States District Court for the Eastern District of Kentucky, before any action in respect to the interests of the Kohns was precipitated or filed in the Franklin Circuit Court of Franklin County, and plaintiff alleges that it is the law of Kentucky, as well as the law of this jurisdiction that a prior pending action filed in the United States Court gives said court control of the assets, approximately $2700 for final adjudication, whether it is in possession of the res or not, and under the laws of Kentucky, Code and decisions, the res was in the constructive possession of the United States District Court for the Eastern District of Kentucky, and though binding on said court, it ignored the positive command of said laws, refusing to order possession into the jurisdiction of said court.

15. That the court refused to determine the action for damages, undetermined in said cause of action, whereby, without service of process on your petitioner, Central Distributing Company, Inc., it

lost its entire business, which business was worth an income of forty thousand dollars annually, and lost its license to do business by an arbitrary and false construction of the laws of Kentucky by a Commission created in violation of the Constitution of Kentucky, the Act of March 7, 1938, being unconstitutional, containing at least twenty-five sections, each of which is a violation of the Constitution of Kentucky as decided by its highest court, and repugnant to the 14th Amendment to the Constitution of the United States.

(a) That the said Act provides for transportation by special provision, when a general Act covers that subject, violating section 59 of the Constitution of Kentucky, section 214 of the Constitution of Kentucky, and section 3 of the Bill of Rights, which prohibits preferential and/or special privileges being extended to any man, corporation or class of men — the said Act extending special privileges to railroads for transportation of liquors, section 2554-b.

(b) That said act authorizes the Internal Revenue Commissioner to create office and fix the salaries of employees, which power may only be exercised by the legislature.

(c) That said Act fixes the retail price of liquors, when the Constitution of the United States prohibits the exercise of said power as an infringement of Article I, section 8 of the Constitution of the United States, and the Anti-Trust laws of Kentucky, and the United States.

(d) That said Act provides that no person shall be allowed to partake of liquors unless he pays

for the said liquors, and that the retailer is indictable if he sells to a person not supporting his family.

(e) That the Statute, when analyzed, contains such a large number of violations of the Constitution of Kentucky, that it would not be enforceable.

(f) The Act of April 30, 1936 and 1938 are both unconstitutional statutes, violate section 8, Article I, of the Constitution of the United States, in that it provides for an import tax to be paid before liquors may be shipped into Kentucky, and though the excise tax of 5 cents is paid to manufacture liquors in Kentucky, if it be necessary to transport out of Kentucky and back through Kentucky to its delivery destination, it shall pay 5 cent tax the second time.

(g) That a part of the tax here sought to be collected is an import tax, void under the state and federal decisions of law, but the petitioner has been denied the constitutional right of trial by jury to determine this fact, United States Constitution, Amendment 7, thereof.

That each and all of the Revenue Act of 1936 contains provisions for the collection of discriminative, confiscatory taxes, which lack uniformity, and all of which were assailed as unconstitutional under the Kentucky Constitution, which the petitioner was denied the right to try out to court and jury, and thus now is threatened with liability to pay the entire sum due plaintiffs which is now in the hands of the Commonwealth of Kentucky and J. W. Martin, and for which sums it has not had a hearing to determine title as provided by due process of law. That under the Constitution of Kentucky denial of a jury right of

trial may not be denied on any disputed fact; the right of trial by jury shall never be suspended (section 7) and in these respects the arbitrary action of the District Court in such refusal and the refusal of the Circuit Court of Appeals to grant Appeal, and the refusal of the United States District Court for the Eastern District of Kentucky to grant appeal, deprives the petitioner of due process as provided by Amendment 14 and Amendments 4, 5 and 7 of the Constitution of the United States. That the contract note secured by mortgage in loan of funds to your petitioner is a contract that cannot be impaired, and is enforceable against this petitioner in the courts of Kentucky, and in the United States District Court of Kentucky, but the arbitrary action of the Circuit Court of Appeals in denying appeal and the arbitrary action of the United States District Court in denying appeal, and the decision of said District Court in denial of trial on the merits, deprives your petitioner of its property without due process of law and of the equal protection of the laws clause, Amendments 4 and 5 of the Constitution of the United States, and the 14th Amendment of the Constitution prohibits the tax statutes above as enforced.

Your petitioner, therefore, as a matter of right, demands an impartial trial of the issues presented by its pleading, and its motion for judgment as aforealleged, and if denied, then a trial of said issues alleged against it to a jury as prescribed by federal and state law. Section 7, United States Constitution and Section 7, of the Kentucky Constitution, inclusive of damages by cross-action.

15. That the said penalties for which judgment is now sought and had against its property, are not imposed as provided by law, which requires penalties to be fixed only at a hearing provided by law, either judicial or administrative in nature, and both. That this right has been denied, and according to testimony, the said penalties are fixed by attorneys and field auditors without legal authority and under invalid statutes.

That in the Act of 1936, one who fails to pay taxes so imposed either import or domestic, may be imprisoned for more than a year and fined, which debt is a financial obligation prohibited of prison sentence under the Constitution of Kentucky. That the wholesaler pays said taxes.

16. That your petitioner is entitled to its adequate remedy by law. It therefore prays this court for a writ to the Circuit Court of Appeals to certify by the record, its denial of appeal, and that it order the District Court for the Eastern District of Kentucky to certify its order denying the docketing of this cause, and that when the same are certified to this court that each of said orders be vacated and set aside, and that the order of this court and the order of April 11, 1938, be vacated, denying the injunction, and that the mandate in this action be revised and returned to the Circuit Court of Appeals for the Sixth Circuit, with directions to direct the United States District Court for the Eastern District of Kentucky to docket the cause, and to sustain the motion for judgment on April 11, 1938, to strike the name of J. W. Martin from the cause of action as a defendant, and that

otherwise, judgment be entered according to the application of the said petitioner, J. W. Kohn et al, for a judgment as prayed in said petitioner's original and amended petition, to-wit:

The amount of said mortgage note, of principal and interest, the sum of $55.00 in cash, and the amount of taxes due the said J. W. Kohn, et al, both of import and consumer's taxes, which have been paid by your petitioner, and that the respondent, United States District Court for the Eastern District of Kentucky, enter judgment on the amount found by proof, which has been paid by your petitioner, for the recovery of said taxes, and proper allowance for reasonable attorneys' fees to be paid to Frank M. Dailey, and all costs expended by your petitioner in preparing this appeal, and such other relief as this court may deem proper; and for final judgment against J. W. Martin and other defendants in necessary acquittal of liability of your petitioner.

Respectfully submitted,

FRANK M. DAILEY,
Attorney for Petitioner.

Exhibits A, B, C, D, E, F, G, H, J, K, L, M, N, and O. are attached herewith as part of this petition, which support its allegations.

Frank M. Dailey.

AFFIDAVIT

STATE OF KENTUCKY
COUNTY OF CAMPBELL SCT.

Eleanor Webster deposes on oath and says that she is the Vice-President of the Central Distributing

Company, Inc., and as such is well acquainted with the facts hereinbefore alleged and stated in this petition for writ of certiorari, and that upon her information and belief these facts she verily believes to be true.

ELEANOR WEBSTER.

Subscribed and sworn to before me, Elsie M. Dewald, a Notary Public in and for the County of Campbell, State of Kentucky, this 22 day of May, 1940.

ELSIE DEWALD, *Notary Public.*

My commission expires 10-29-40.

J. W. KOHN, et al.,

No. 4132, United States District Court for the Eastern District of Kentucky.

vs.

CENTRAL DISTRIBUTING COMPANY, INC., et al.,
No. 8554, United States Circuit Court of Appeals for the Sixth Circuit.

EXHIBIT A.

"This cause coming on to be heard on Plaintiff's motion to restore the above-captioned case to the docket of this court, and it being made to appear to the court that the Supreme Court of the United States, in its opinion reported in 306 U. S. 531 (Case No. 177) has affirmed the judgment of the three judge court in dismissing the petition herein; it is ordered and adjudged that plaintiff's motion should be and the same is now overruled. The court being of the opinion that plaintiff's motion to restore the within case to the docket should be overruled, it necessarily follows that plaintiff's motion for summary judgment and plaintiff's motion for judgment for the reason that no substitution for a resigned officer was made by the Commonwealth of Kentucky (in Kentucky, within six months), a defendant, which motions have been tendered, should be refused (filing) and it is so ordered.

(Signed) MAC SWINFORD,

Judge, United States District Court
Eastern District of Kentucky.

CERTIFIED
A. B. ROUSE, Clerk
Feb. 27, 1940

EXHIBIT B.

Order entered April 12, 1938 in the United States District Court for the Eastern District of Kentucky:

> "It is ordered this cause be set down for hearing at Federal Court Bldg., Louisville, Kentucky, on April 16, 1938, 10 o'clock A. M., before a three judge court." (The balance of the order is omitted).

EXHIBIT C.

United States Circuit Court of Appeals for the Sixth Circuit, May 15, 1940:

> "It is ordered that the petition of J. W. KOHN, et al, for allowance of an appeal in this cause be and the same is denied."
>
> (Signed) J. W. MENZIES, Clerk."

EXHIBIT D.

Motion and Affidavit in the United States District Court for the Eastern District of Kentucky:

> "Comes now Harvey H. Smith, counsel for plaintiffs' and suggests to the court that he is duly informed by official information from the State of Kentucky that J. W. Martin, on July 1st, 1939, resigned as Revenue Commissioner of said state, and he suggests that inasmuch as his successor is not qualified as a party in this action, this action continue in the name of the Central Distributing Co., Inc., and Louis C. Sickmeier, as defendants, and that the court make the proper order in this case, so continuing said cause against the defendants and as representatives

of the State of Kentucky for all of the purposes of the proceedings in this case. That the Auditor of the State be made a party to this action."

(This motion was denied in the preceding order of the court E. & A.)

EXHIBIT E.

United States District Court for the Eastern District of Kentucky, April 23, 1940:

"Motion for Bill of Exceptions denied."

EXHIBIT F.

United States District Court for the Eastern District of Kentucky:

"This day came Harvey H. Smith and offered for filing Motion for New Trial, Motion to Correct Imposed Judgment and Make Proper Findings in the above-styled case. It appearing to the Court that an order dismissing this case was entered on April 16, 1938, motion for new trial is overruled.

(Signed) MAC SWINFORD, Judge

March 13, 1940
Certified
A. B. ROUSE, Clerk."

EXHIBIT G.

Amended Petition in the (Franklin Circuit Court), filed May 2, 1938, by Samuel M. Rosenstein, of counsel for Commonwealth of Kentucky, by and on relation of J. W. Martin, Commissioner of Revenue, asking that J. W. Kohn, et al, be made parties to this action.

EXHIBIT H.

May 21, 1938, Petition for Removal to the United States District Court for the Eastern District of Kentucky, filed by J. W. Kohn, et al., and signed "Smith & Schuberth," joined by Henry J. Cook, Attorney for Central Distributing Co., Inc.

EXHIBIT I.

Order of the court May 21, 1938, Removing.

EXHIBIT J.

Motion to Quash Service, signed by Henry J. Cook, Attorney for Central Distributing Co., Inc., filed November 2, 1938, in the Franklin Circuit Court.

EXHIBIT K.

Motion to Quash Service on Central Distributing Co., Inc., and dismissal of writ of service from the record herein, filed November 2, 1938:

> "Reserving their objections to the jurisdiction of this court, and moving to quash the service on the grounds set out, etc."

EXHIBIT L.

Special demurrer filed by J. W. Kohn, et al, on November 2, 1938. The demurrer was denied on the ground that there was no misjoinder of parties plaintiffs, (J. W. Kohn, et al, not yet having been served in the manner provided by law.)

EXHIBIT M.

Motion to dismiss on the 4th day of November, 1938, by J. W. Kohn, et al:

> "Move that this attachment be dissolved, and this petition be stricken and the cause of action be dismissed. That it appears from the record that this court is wholly without jurisdiction."

"The grounds of said motion being that this court has no jurisdiction over the subject matter of this action. That this court has no jurisdiction of the defendant, as shown by the record. That there has been no service on the defendant, Central Distributing Co., Inc., and no summons issued or served by any court that had jurisdiction of the subject of the action, and that this demurrer ought to be sustained, and the attachment action dissolved, and the cause of action dismissed.

EXHIBIT N.

Affidavit of Harry Bayer, November 10, 1938:

"Affiant further says that on May 1, 1937, said J. W. Kohn, M. S. Kohn, and Carrie Kohn had by agreement taken possession of the stock of goods and merchandise consisting of wines and liquors, fixtures, cash registers, safes, and all of the assets of said Central Distributing Co., Inc., and simultaneously placed said affiant in charge as their agent, in collecting the amount due them by virtue of said note and chattel mortgage. Affiant has read the foregoing instrument and avers that it is true in every respect.

(Signed) Harry Bayer.

Subscribed and sworn to before me this 10th day of November, 1938.

(Signed) Elsie M. Dewald,
Notary Public.

(S E A L)

My commission expires 10-29-40.

(The said action of the Commonwealth of Kentucky, on relation of J. W. Martin, plaintiff, having no plaintiff at the time of the trial, judgment was void and there is now pending only the cross-petition of J. W. Kohn, et al, against the Central Distributing Co., Inc., in the Court of Appeals of Kentucky).

The above constitutes all of the record that is important in this action, showing that the United States District Court for the Eastern District of Kentucky first had jurisdiction of the res by the action of February 26, 1938, Six months before the Kohns specially appeared in the Franklin Circuit Court in the State of Kentucky. There is no record of proper service of the Kohns in the action and there is no record of proper service on the Central Distributing Co., Inc., in the United States District Court for the Eastern District of Kentucky.

EXHIBIT O.

"United States District Court
Eastern District of Kentucky
At Covington

J. W. Kohn, et al,

vs.

Central Distributing Co., Inc., et al.

Comes now the Plaintiff and tenders its Motion to Strike, and it appearing to the Court that the above styled case is no longer on the docket the Motion cannot be entertained and is ordered placed with the record but not filed.

MAC SWINFORD, Judge.

April 1, 1940."

EXHIBIT P.

Motion to Dismiss — Filed April 16, 1938:

"Come the defendants, Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, and Louis C. Sickmeier, Sheriff of Campbell County, Kentucky, and move the Court to dismiss plaintiffs' petition as amended; and as reasons for said motion state that plaintiffs herein have a plain, adequate and complete legal remedy and that this Court is without jurisdiction to grant the relief prayed for in plaintiffs' petition as amended.

Wherefore, these defendants pray that the petition as amended herein be dismissed.

Hubert Meredith, Attorney General,
Commonwealth of Kentucky, by William
Hayes, Assistant attorney General.
Clifford E. Smith, J. J. Leary,
General Counsel, Department of Revenue."

EXHIBIT Q.

Judgment and Order Allowing Appeal:

"This cause coming on for hearing before the Honorables Elwood Hamilton, United States Circuit Judge, John D. Martin, United States District Judge, and Mac Swinford, United States

District Judge, on the motion of the petitioners for a temporary and permanent injunction, and the petitioners being present by counsel H. H. Smith and Henry Cook, and respondents being present by cousel J. J. Leary and William Hayes, Assistant Attorney General for the Commonwealth of Kentucky; and the Court being fully advised, it is ordered, adjudged and decreed that the temporary and permanent injunction of petitioners be denied, and the motion of petitioners for said injunction be and is hereby overruled; and the petitions of the petitioners are dismissed, to all of which petitioners object and except.

It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act," furnishes petitioners an adequate remedy in Section Twelve (12) (Fol. 47) of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act.

Petitioners, by their counsel, announced that they wished to appeal to the Supreme Court of the United States from the judgment, order and decree of this Court, and give notice in open court to that effect; which appeal is now granted and allowed by the Court.

Enter this 16th day of April, 1938.

Elwood Hamilton, United States Circuit Judge

John D. Martin, United States District Judge

Mac Swinford, United States District Judge."

Supreme Court of the United States

October Term, 1940

No. 332

PLAINTIFF'S BRIEF ON PETITION FOR CERTIORARI

J. W. KOHN, M. S. KOHN, AND J. W. KOHN, Administrator of the Estate of Carrie Kohn, deceased, and CENTRAL DISTRIBUTING COMPANY, INC., (A Defendant).

Petitioners

vs.

CIRCUIT COURT OF APPEALS for the SIXTH CIRCUIT, with direction to the UNITED STATES DISTRICT COURT for the Eastern District of Kentucky, and J. W. MARTIN, et al.,

Respondents

Case of J. W. Kohn, et al., vs. Central Distributing Company, Inc., and J. W. Martin, et al, pending in the United States District Court for the Eastern District of Kentucky.

The Defendant Central Co. join in this Petition for the Writ. (Former Appeal No. 177)

The law for this Application is U. S. Code 237 (b) 28 U.S.C. 344-7

HARVEY H. SMITH,
Attorney for J. W. Kohn, et al

GEO. E. WHITMAN,
Attorney for Central Distributing Company, Inc.

INDEX AND LIST OF DECISIONS

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Panama Mail Co. vs Bargas 281 US 670.
U. S. vs Rimer 220 US 547.
Supreme Judicial Code Sections 240 etc.
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77 US 10, Wall, 416-418-Rule 74-75. Ky. Statutes.

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The Order of February 29th, 1940 denying Trial on the merits.

Internal Revenue-Martin, demitted as a party-defendant July 1, 1939.

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Motion for Judgment on April 11th, 1938 never passed on. Motion to Dismiss defense of Defendant Martin denied, and Motion for Pro-Confesso Judgment denied, 10 to 15.

Original Revenue ACT of 1934 provided the Auditor must bring suit for delinquent Taxes, and section 4169 Article 9 of the Statutes provides that the AUDITOR must collect defaulting obligations in Taxes, and section 112-5 to 112-8 provide the ATTORNEY GENERAL is the only party who can appear as Counsel in this kind of a case. Pages 10 to 13. Remedy in the Act.

Section 112-7 provides that the Attorney General shall keep the record;

Section 112-5 provides no outside counsel shall be employed—, Commonwealth vs Roberta Coal Co. 186 Ky. 402, construes the Statutes, and is supported by the following decisions:
C. & O. Railroad Co. vs Roskamp 179 Ky. 175.
McAlexander vs Wright 3 A. K. Marshall 189.
Belt vs Wilson 6 J. J. Marshall 495.
Commonwealth vs Louisville Property Co., 128 Ky. 780.
4 Cyc 928 and authorities there cited. Pages 15 to 20.

FRANKLIN CIRCUIT COURT HAD NO JURISDICTION UNDER SECTION 976, Carroll' Code.

Code of Kentucky, section 117.

Milwaukee County vs White Co., 296 US 268.

The Statute under which the Tax accrued was 1936 provides for imprisonment, and under the authorities cited, the Court had no jurisdiction to issue a Summons or Order of Attachment.

Helm vs James 129 Ky. 239.
Commonwealth vs Long 30 SW 629.
Barbour vs Newkirk 63 Ky. 631.
Life Ins. C. vs Edwards 247 Ky. 136.
Bankers Life, 254 Ky. 686.

NO ASSESSMENT WAS MADE ACCORDING TO LAW TO ADJUDICATE THE PENALTIES.

Section 679 Carroll's Code, City of Corbin vs Board of Education 26 Ky. 787.
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Case No. 18,076, Wright vs Deklyne.
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DEFAULT IN PLEADING BARS FURTHER ACTION IN A PENDING CASE AND MAKES ANY JUDGMENT VOID RENDERED BY THE COURT, BY OPERATION OF LAW.

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Asher vs Fordson Coal Co. 249 Ky. 117.
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Texas vs Wilder 92 Fed. (2) 993.
L. & N. Railroad vs Finn 235 US 601.
U. S. Supreme Court, rule 60, and decisions there cited. Pages 25 to 28.

COURT MUST MAKE FINDINGS, OR JUDGMENT IS VOID.

Lewellyn vs General Electric Co., 275 US 243.
Hardey vs Malley 288 US 415.
General Motors vs Swan 44 Fed. (2) 24.
Gerlach vs C. I. P. R. R. 65 Fe. (2) 867.
Hawthorne vs Bankers Life Co. 63 Fed. (2) 971.
Merriam vs Kusselman 45 Fed. (2) 983.
Title 28 USCA, Sec. 773.
Interstate Life vs Klaber 50 Fed. (2) 154.
American Surety Co. 58 Fed. (2) 234.
There can be no due process unless findings and conclusions are made when requested, and findings moved by party. Page 20 to 30.

DUE PROCESS AND EQUAL PROTECTION OF THE LAW DENIED ON THE RECORD.

Taylor on Due Process Sec. 138.
Scott vs McNeal 154 US 34.

Windsor vs McVeagh 93 US 274.
Royal Indemnity Co. vs Woodbury Granite Co. 101 Fed. 689.
Globe Steel Co. vs National Metal Co. 101 Fed. (2) 489.

THERE MUST BE A FINAL JUDGMENT OR THERE IS NO DUE PROCESS OR EQUAL PROTECTION, BECAUSE THE PARTIES TO THE ACTION COULD HAVE NO RIGHT OF APPEAL EXCEPT FROM A FINAL JUDGMENT. No Appeal from void Judgment.

Hohorst vs Picket Co. 148 US 262.

Oneida Navigation Corp. vs Job 252 US 521.

Arnold vs US 263 US 427.

Thompson vs Murphy (8th Circuit) 93 Fed. (2) 38.

Hobbs vs Westinghouse Co. vs Employers Liability Corp. 102F. (2) 32.

Baldwin vs Higgins 100 Fed. (2) 405.

Kilmer vs Griswold 67 Fed. 1017.

Hill vs Chicago R. R. Co. 140 US 52.

Ex-Parte Enameling Co. vs 201 US 156, pages 28 to 33.

UNLESS STATE LAWS ARE COMPLIED WITH THERE IS NO DUE PROCESS OR EQUAL PROTECTION OF THE LAW.

Rules 27, C. C. A. reports, see the case of Shoemaker vs. Security Co., 159 Fed. 113.

Rev. Statutes Sec. 914, US Compiled 1901, page 684.

Erie Railroad Co. vs Tompkins 304 U. S.

Kentucky—Weber vs Weber 1, Metcalfe 18; Case vs Colston 1, Metcalfe 145.

Thomas vs Mahonney 9th Bush 111.

Manderson vs Speckert 79 Ky.

Kentucky Code 667, 509.

Taylor vs Breese 63 Fed. 678, pages 31, 32.

THE RIGHT TO FORECLOSE MORTGAGE IS A CONSTITUTIONAL RIGHT UNDER THE LAWS OF KENTUCKY AND IS A COMMON LAW ACTION TO BE TRIED TO A JURY UNDER ARTICLE 7 OF THE CONSTITUTION OF KENTUCKY, AND AMENDMENT 7 OF THE CONSTITUTION OF THE UNITED STATES; AND CANNOT BE WAIVED EXCEPT BY AN ENTRY ON THE RECORD.

Kentucky Code Sec. ———.

Marshall vs Holmes 141 US 589.

DeRees vs Costagua 254 US 170.

Wells Fargo Co. vs Taylor 254 US 175.

Rogers vs Hill 289 US 588.

Gulf Refining Co. vs US 269, US 125.

Sec. 57 Judicial Code, Title 28 provides for enforcement of Lien in Federal Court.

Orear Case 23 Ky. Reporter (1912).

Cmmnowealth vs Scott 80 Ky. 498.

COLLECTION OF IMPORT TAX VIOLATES SECTION 3 OF THE CONSTITUTION OF KENTUCKY, AND ARTICLE 1, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES.

J. Bacon & Sons vs Commonwealth 304 US 178.

May it please the Court:

QUESTIONS TO BE DECIDED IN THIS CAUSE INVOLVED IN EFFECT VALIDITY OF THE ORDER OF APRIL 16, 1938.

(Summary)

1. Can a Court so constituted (three Judges), hold a session out of the District where the cause of action is pending, and enter a valid Decree? It cannot by all decisions—cannot be waived.

2. Can a THREE JUDGE COURT enter a final decree in an interlocutory judgment, denying temporary injunction: Statute and decisions of this court prevent it?

3. Can a trial court refuse to make conclusions of law when moved to make them, where said motion is accompanied by special findings? No.

4. Can a THREE JUDGE COURT adjudicate the merits without hearing evidence on the merits. Title 28 section 773? No. Case 18076—Wright vs Deklyn, (Fed.) Void.

5. Can a trial court refuse to disallow appearance of counsel demitted by section 780, Rule 25, who have, as to the parties represented and with them, by operation of law been excluded from the cause? Sec-

tions 501 to 508, Kentucky Code; and any judgment rendered under Kentucky Code under such state of record is void.

6. Can the trial court permit appearance of parties to a proceeding who are by operation of law excluded, where they have not been substituted by revivorship? No; must proceed by service of summons and entry of final order of Court.

7. Where a motion for judgment, when defendant is in default, is made, affidavits permitted in support, can a court arbitrarily refuse to pass on the motion, and thereafter allow incompetent parties to appear and file motion to dismiss, and sustain said latter motion? No, the first motion must be disposed of.

8. Can a Motion for pro-confesso judgment be refused where the defaulting party has not plead for more than six months, without leave of court granted? Under Kentucky Code, no; and under Federal rules, 54, 55a and 60, no.

9. Can a summary judgment be refused, where there is more than six months default, and all pleaded facts are definite, except amount of damages? Not under Kentucky Code and Rule 56.

10. Where the statute of the state limits employment of counsel to emergency matters, outside of Attorney General, and fixes in a tax act who shall collect taxes under the act that are delinquent, can a suit be maintained by different party under different Act, which does not repeal former general law,

being a special Act, when the special Act is prohibited by section 59 as well as 51 of the Constitution, and Counsel employment is controlled by General law, section 112-5? Decided by Court of Appeals of Kentucky, such counsel cannot appear and such party cannot file suit.

11. Where a THREE JUDGE COURT finds the plaintiff has an adequate remedy at law, is a prior suitor compelled to abandon Federal trial court, without jurisdiction being assailed, if questions arising under laws of United States are pleaded, and jurisdictional amount and diverse parties are shown. No; Rule 39 and authorities, Hale vs Allison 188 U. S. 56, Also rule 75.

12. Both conclusions of law, if only legal questions are presented, and if any facts are presented, findings of fact must be made or cause will be returned for such findings. Rule 70½ and Humphrey vs Helgerson 78 F. (2) 706-8, Interstate vs U. S. 304 U. S. 55.

"Let the cause be remanded for such failure with permission to make such defense on the merits as pleadings show."

Taylor vs Breese 163 Fed. 678, is the rule.

JURISDICTIONAL STATEMENT

Under Section 374, USC Title 28, Judicial Code 240, Certiorari from the Circuit Court of Appeals, and Section 347 Sub-paragraph A, application is author-

ized to the Supreme Court of the United States, under the issues made in the hereinafter litigated issues.

> "In any case, civil or criminal, in a Circuit Court of appeals, either before or after a judgment or decree by such lower court, for determination by the Supreme Court with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

United States Code, Title 28; 877, provides that the Supreme Court, upon determination of the case, shall remand it to the proper District Court or the Circuit Court of Appeals for further proceeding in pursuance of such determination. If the Circuit Court of Appeals has failed to consider the case, then in that event, it will be remanded to that court. Where no findings of fact have been made in a case when demanded the Supreme Court will remand to the District Court with directions to make the findings. Where the real situation is not disclosed on the petition for certiorari, or where a question differs from that disclosed in the petition developed on argument, the writ will be dismissed. Sustaining this position are the following cases.

Lutcher and Moore Lumber Co. vs Knight, 217 U. S. 257.

Lonergan vs U. S., 303, U. S. 33.

Panama Mail Co. vs Bargas 281 U. S. 670.

U. S. vs Rimer 220 U. S. 547.

Supreme Judicial Code Sections 240, etc.

STATEMENT OF FACT

In its original inception, this case was brought by your petitioner in the United States District Court for the Eastern District of Kentucky, on the 24th day of February, 1938, against J. W. Martin, acting for the Commonwealth of Kentucky, who, as Internal Revenue Commissioner, on the 15th day of February, 1938, had attached the business and assets of the Central Distributing Company, hereinafter referred to as the Central Company, in Campbell County, State of Kentucky. This attachment asked for approximately $4,500, Domestic and Import Taxes, alleged to be due the Commonwealth of Kentucky, under the terms of an act licensing wholesale liquor dealers under 1934 enactment, by the Legislature of Kentucky; and a tax act enacted on the 30th day of April, 1936, by which acts, the wholesaler was required to pay a consumer's tax of $1.04 per gallon before the sale of the liquor, and $.05 per gallon before the importation of the liquor into the State, a $.05 per gallon tax being exacted from the distiller as a manufacturer's tax, and if the liquor was shipped out of Kentucky and stored in another state, and sold and returned to the State of Kentucky, the $.05 per gallon tax would be again exacted, although the Act provided that no two taxes should be levied on the same gallon of whiskey.

The Act of 1934 was a Beverage Sales Act, and authorized wholesalers to buy and sell whiskey as a beverage. The Act of 1936 which provided for the tax would have been useless, and without exercise of power granted by the legislature unless the 1934 Act was a valid and subsisting statute.

Amendment 7 of the Constitution of Kentucky at that time prohibited the sale of liquor as a beverage, and prohibited the licensing of a wholesaler for the purpose of engaging in such a sale as a beverage. The Act was therefore void. The Act of 1936 which required the wholesaler to pay the taxes, both import and domestic, was therefore a complementary act, and by the Legislature of Kentucky was duly enacted, without any authority under the Constitution, because the sale of an article prohibited by the Constitution could not be taxed except in the form of a penalty and this Act did not provide a penalty tax only but an excise tax on the sale of merchandise in a lawful business, or one authorized by law. Therefore it will be contended here that neither Act was a subsisting statute.

The Court of Appeals of Kentucky, the highest Court in the State had frequently held that liquor could not be sold as a beverage under Amendment 7 of the Constitution. It had also held that the laws of the United States and the decisions of the Supreme Court of the United States were as much a part of the laws of Kentucky as the laws enacted by the Legislature of Kentucky; and that any statute enacted by the Legislature in violation of the Constitution of the State was no statute and might be disregarded as no law by mankind.

THE QUESTIONS INVOLVED IN THE RECITED POINTS

We are considering the questions here, raised by the points as shown in the record, without regard to exactness and number.

The first question presented, is, that the United States District Court for the Eastern District of Kentucky should determine its jurisdiction which it did in favor of the cause of action filed by the plaintiff. The Plaintiffs were not parties to any other action at that time, in the State of Kentucky, and therefore, this action had priority, in respect to the plaintiffs, your petitioners, who will be referred to as plaintiffs' in this brief, so that in discussing the issues here, they will be discussed with the understanding that no other action could affect this litigation, because the right to pursue the Federal Court as a Forum was a constitutional right, as citizens of Ohio; questions arising under the Laws of the United States, although the citizenship and the amount involved were sufficient to give the Federal Court jurisdiction.

The trustee under the mortgage.

A mortgage was executed long prior to the attachment, which was attached to the petition and which was duly filed and certified in the County Court of Campbell County at the time the attachment was sued out, which was for the sum of $3,000, money borrowed by the Central Company from your petitioners who resided at Cleveland, Ohio.

The suit was therefore for the purpose of foreclosing said mortgage and to recover taxes collected under the Illegal Assessments amounting to about $22,000, not including other assigned claims. These taxes were assigned to the plaintiff's by the Central Company for money advanced in the trade and the payment of Federal Taxes on liquors withdrawn from warehouses.

The assets of the Central Co. were seized by the Sheriff of Campbell County and the business closed and destroyed. The assets on hand at that time amounted to approximately $2800, and judgment was asked in the State Court, Franklin County, for approximately $4,500, about $1,400 of which was for illegal penalties never legally assessed, under these statutes.

THE ORDER OF DISMISSAL RELIED ON IS VOID, ON SEVERAL GROUNDS, ONE WITHOUT DISPUTE ARGUMENT.

QUOTATIONS ARE IN SUBSTANCE:

A cause pending in the Western District in a county transferred to the Eastern District, the Western District lost jurisdiction, and could not make any order thereafter, not even tax the costs.

It is quite true that the descriptive term has since been given another meaning but that does not change the particular legislative intent to include just the territory properly described by that description. It was excluded from another territory, and excluded from the jurisdiction of the rendering court.

"The Court was without jurisdiction of any of the causes of action, and I will dismiss the complaint. The order was a judicial act, the court has no power to make it, and it can only be done at the next stated term of the Court at Toledo, (not at Cleveland in the same district).

Sitting at Cleveland the Court had no jurisdiction to make an order pending in the district court at Toledo."

McClashan vs. U. S. 71 Fed. 434. Ex.B. pg. 41 C.

"The judgment is inoperative and void"

"Trial and judgment must be in the district"

U. S. vs. Kissel 63 Fed. 433.

Williams vs. Gea. Gully, 29 Federal Cases 17,736

"Has no authority to enlarge jurisdiction so as to hold a term of court in another district."

Hartford Fire Ins. Co. vs. Erie RR Co. 172 Federal 899.

"Such jurisdiction cannot be conferred by waiver."

"Limits the jurisdiction of the court when holding a term to the territorial limits of the district for which that term is provided."

The Sarah Kennedy, 25 Fed. 569.

Must sit in the district where the cause of action arose, judgment out of the district is a nullity.

9th Circuit, Seattle Electric vs. Hartless 144 Fed. 379, Tacoma Railroad vs. Geiger 145 Fed. 76.

Wan Lee vs. U. S. 44 Fed. 708. Same conclusion. The division for which that term is provided must be tried in the district where the court is sitting.

Territorial limits are defined by statute, and a proceeding outside the district is void, for the defendant must be sued in the district where he resides.

Hall vs. Devoe Manufacturing Co. 108 U. S. 415.

The Act of March 3, 1887—McGlashan vs. 71 Fed. 436.

Kibler vs. St. Louis Ry. Co., "Must be in the limits of the counties enumerated in the bill. 147 Fed. 879, U. S. 45 Fed. 159.

Pitman vs. Kibler, 147 Fed. 879. Pitman 45, 159. Butler vs. U. S. 87 Fed. 625

Common law court is in session from date fixed by law until it adjourns at the time and place fixed by law.

Same case:

Rosencrans vs. U. S. 165 U. S. 263

Case cannot be transferred from one district court to another. Where Congress has legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by mere inference.

Section 83 U. S. C. of the Judicial Code fixes the limits of both Kentucky districts and the terms of court, and judgment can only be rendered in the territorial limits of that district, not even can it be waived, nor can judgment be entered out of terms of court fixed by law or special term fixed by the court.

NO SERVICE WHATSOEVER WAS EVER HAD ON THE CENTRAL COMPANY AS PROVIDED BY THE STATUTE AND CODE OF KENTUCKY.

Page 16, 17, 18, 19, 20 and 24 Pet. of Central Co.
Page 16-19 C.

The service or order of attachment was issued by the Clerk of the Franklin Circuit Court to one Philips its Sheriff, directing him to serve on William

Ploss, designated service agent, who resided in Campbell County, the order of attachment. The Sheriff of Franklin County cannot serve an order of attachment in any county other than where he resides. *An order of attachment cannot be served by any other person except the officer to which it is directed.* It was served by Louis Sickmeier, the Sheriff of Campbell County, where the place of business was located. The service was not made on the service agent William Ploss, and therefore not served on the person which the order directed it to be served on, nor by the *officer* who was directed to serve it. The *place of business* was located in Campbell County, the vice-president and secretary were in Campbell County, and in the place of business when the sheriff attempted to serve the order. He never served the order on an officer of the corporation, but did serve the order on Harry Bayer, an individual who had no relation whatsoever as an officer, stock holder, director or manager of the corporation.

He was agreed upon as the trustee or bailee of the mortgagor and mortgagee to dispose of the assets and complete the business of liquidating the affairs of the corporation. Under the laws of Kentucky, merchandise in the hands of a *trustee or bailee is not subject to attachment.* The return of the officer, Sickmeier, shows that the service of the order was made on Harry Bayer, manager of the Central Company. There was no such officer, as shown by the affidavits and testimony. The affidavits were before the court in support of a motion for judgment on April 11, 1938, in support of a restraining order, pending an application to a *three judge court* to determine the question of a *preliminary injunction only.*

Under the laws of Kentucky in respect to service of process, an affidavit may be filed to determine whether there is jurisdiction in the court or not. The Court refused and failed to determine this question, and has never determined it, and as to the merits, that petition is still pending and has never been answered, and J. W. Martin is in default as well as the Commonwealth of Ky. and Louis C. Sickmeier.

The Trial Court denied the motion to refer to three judges. The plaintiffs appealed to the Circuit Court of Appeals by mandamus, and that court notified the District Judge that the court would sustain the mandamus, who promptly withdrew his previous order and made an order referring the cause to a three judge court.

NO SUMMONS WAS EVER SERVED.

Pgs. 16-17-19 C. (Refers to Central petition).

It was clear from the record that no summons was ever served on The Central Company or on any individual determined by cursory examination of the record, and the Trial Court was duly informed of this fact, and knew that under the laws of Kentucky, the statute, the code of practice, and numerous decisions of the highest court of the state that no jurisdiction could be obtained by any court in Kentucky unless a summons was first issued on the cause of action and served before the service of the attachment or at the time of the service attachment, consequently, he knew, and the three judge court knew, that the State Court was without jurisdiction, had seized the property without due process and had taken the res from the United States District Court,

against which a mortgage existed, and no general appearance made.

THE HEARING AT LOUISVILLE VOID.

Ex. B. Pg. 41-C. (Central petition).

The order of the court, was, that the three judge court should sit in the City of Louisville, which is a place outside of the Eastern District, where this action arose, and where the District Court must sit to make valid and judicial orders. The Act defining the District is Judicial Code 83, which places Jefferson County, where the Court sat, in the Western District of Kentucky.

At the time of the sitting of the Court, which was ordered by the District Judge out of the district, April 12, 1938, the term of said Court extended from the first Monday in April to the third Monday in October, of each year, so that within this District the Court must sit within this time and hold its session according to the rules of the Supreme Court "in a building provided for this purpose," or if it is not held according to this requirement, "it can only be held at such other times and places as may hereafter be provided by law." The order of the Court to hold the hearing at Louisville was not within the terms of the statute. It has been repeatedly held that a judge in one District cannot proceed into another District and hold his court, and as a three judge court, is a supplemental district court, it, of course, would have no jurisdiction to make any valid order or enter any valid judgment in the City of Louisville. (Record, pages———).

THE QUESTION INVOLVED HERE.

Ex. pgs. 46-47. (Central petition).

The immediate question involved here is, that if the judgment at Louisville, denying the injunction, is to be relied upon, then it defeats the action of both the District Court and the Circuit Court of Appeals, in denying the right to try the merits of the case. This, because the three judge court adjudicated at Louisville that the plaintiffs had the right to try the merits of the Cause of Action on the law side of the United States District Court for the Eastern District of Kentucky, because they decided that *no injunction* would be granted because the plaintiffs had an adequate remedy at law, which language means, as interpreted by the Supreme Court of the United States and all of Circuit Courts of Appeal, except one, that the right of trail by a jury on the merits has not been considered as an issue in the equity court where the injunction was determined. Inasmuch as the United States District Court took jurisdiction, "adequate remedy at law" means, within the terms of the statute governing the trial of common law issues to a jury. This right was denied by the order of the District Judge on February 29, 1940, sitting in the City of Covington, Kentucky.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Ex. A. pg. 40-C.

The appeal to the Supreme Court of the United States by the plaintiff from the order of dismissal entered on April 16, 1938, was duly made, and was

duly affirmed by the Supreme Court in respect to the right to injunctive relief against the defendants *who had seized the res.*

This order of dismissal was void, had the questions of jurisdiction been raised, the record would so show. This Because, no appeal can be taken from a void order of court. This court order was void because it was made out of the District. It was also void because, signed by three judges, both the Federal Code and Statute requires that it be signed by the District Judge. The jurisdiction ends under Section 266 of the Judicial Code when the three judges deny the injunction. It was void because an order of dismissal cannot be sustained if entered by three judges. This alone, is within the jurisdiction of the single District Judge.

The Supreme Court of the United States has frequently held that no appeal will lie to that Court only in an injunction proceeding, because the merits of the case cannot be considered before the three judge court, could not be considered by the supreme court, and therefore could not be reviewed upon appeal.

The principles of law are so elementary that we cite only a few decisions later in this brief.

THE MANDATE OF THE SUPREME COURT.

The mandate of the Supreme Court of the United States came back to the United States District Court with nothing in said mandate to justify the District Judge denying a trial on the issue precipitated in said petition, and, if the issues so precipitated were insufficient to justify the denial of a trial of the ac-

tion it was the duty of the court to make a finding, either of fact, or a conclusion of law, in order to justify any support of his judgment. If there are no facts, he is not released from making his conclusions of law, as in either case he must rely upon the record as it stands, or upon findings of fact, to reach a final judgment.

WHAT THE PETITION CALLS FOR.

The amended petition of April 11, 1938, called for a foreclosure of the mortgage, a common law issue, a demand for $22,000 of illegal taxes or more, and a demand for damages for the destruction of the business, the seizure of the property, and the return of both import and consumers taxes, if the injunction should be denied or affirmed, in either case.

Durrett Case, 23 Ky. 547.

THE ORDER OF THE COURT OF FEBRUARY 29, 1940.

Ex. A pg. 40-C.

The Court entered an *opinion,* not a decision nor a judgment on this date, reciting that the judgment at Louisville on the order of dismissal *was a full and complete determination of all of the issues in this case.* The appeal was taken from this order to the Circuit Court of Appeals for the Sixth Circuit. This appeal was denied by the District Court for the Eastern District, or rather the Hon. Mac Swinford, the Judge thereof, in chambers. The Court of Appeals also on May 15, 1940, denied appeal from said order, and refused to make findings or to sustain

the motion for findings filed by the plaintiffs in this action. Of course, the Circuit Court of Appeals can do no such thing. They must make findings, and if there are no facts before them controverted they must write conclusions of law, so this court may be advised what reasons they had for denying the appeal and denying the mandamus. Rec.

If the order of February 29, 1940, was not an appealable order, the only other remedy was mandamus, and if the Circuit Court had no jurisdiction, it must say so, so that the plaintiffs in this action could act accordingly. As we have said, the District Court and the Circuit Court of Appeals must make findings of fact and conclusions of law, and neither Respondent made *such findings* or conclusions.

THE UNITED STATES DISTRICT COURT JUDGE HAD NO JURISDICTION TO PROCEED AS HE DID.

Ex. D pg. 41-C.

In the first place, motions were made to dismiss the cause of action and discharge the attachment by orderly process, and secure possession of the res which was denied by the Court.

A motion was made to proceed pro-confesso, as by summary judgment, and also to dismiss the cause of action in respect to the defense of the Commonwealth of Kentucky. All of these motions were denied by the Court or the Judge.

July 1, 1939 *was the dead line of jurisdiction.*

Section 780, USCA, provides that unless a defendant, who disappears by resignation from office,

revives such defense, under the Code of Kentucky and under this Section of the Statute, the defense ceases to exist, and the attorneys for such defendants disappear from the record, and the cause of action.

The action should then proceed ex-parte. This, on this record, because the only question pending before this court was the motion for judgment on April 11, 1938, made by the plaintiffs, when J. W. Martin was a party. This was a motion against the default of the defendants to plead. Under the Federal Code and the Code of Practice in Kentucky, and under the Statutes of Kentucky, an answer or a pleading must be filed within twenty days after the service of the summons. No pleading was filed from the 24th day of February, 1938, up to April 16, 1938, which approximately was one month and twenty days. No leave of court was asked to file the motion to dismiss before the *three judge court* and the filing of which, and the judgment based on which, was objected to and excepted to by the plaintiffs in this action. No judgment can be rendered and no pleading filed on which said judgment is based, when not filed by leave of court if the defaulting party has not filed a pleading within the terms of the code or statute. If objection is not made such pleading will be considered as having been filed with consent of the opposing parties. Rec.

LET US TAKE A LOOK AT THE RECORD AND SEE.

If J. W. Martin could answer for the Commonwealth and if there was really an objecting plaintiff, or, whether he was a proper party to defend the

action under the authority of the Commonwealth, in order to determine whether the motion of April 11, 1938, for judgment, could be sustained on this ground. We contend the Commonwealth of Kentucky could not answer, and could not make the motion to dismiss in the City of Louisville on April 16, 1938, and that the injunction applied for at that date should have been granted for the reason, that there was no denial and no motion filed, challenging the pleadings of the plaintiffs. THIS WAS AN ACTION IN RESPECT TO TAXES, ATTEMPTED TO BE COLLECTED BY THE COMMONWEALTH IN A STATE SUIT, AND THE PETITION TO RECOVER TAXES UNLAWFULLY PAID TO THE STATE UNDER INVALID STATUTES WHICH INCLUDED AN IMPORT TAX, A CLEAR VIOLATION OF ARTICLE 1 SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES, REGGULATING COMMERCE.

The proper party to this action, and to the void proceedings in the State Court against the Central Company *was the Attorney General of the State of Kentucky and the Auditor.* The Act of 1934, Section 10, provides that the Auditor must bring the action. Where a special act provides for official action, the person named in the action must bring the action, and so in a suit to collect taxes, unless this special act is of itself void or in conflict with the general law on the subject he must act. We conclude the act is void, but in such an event we fall back on the Statute. This special section is as follows:

> "Section 10 of the Original Act 1934 to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall

be deemed delinquent and a penalty of twenty per cent on the amount of license tax due shall attach, and the Auditor shall at once cause such proceedings to be instituted for the collection of such license, with such interest and penalties as may be provided by law for the collection of other taxes."

Section 4169, Article 9, provides that the Auditor must bring the action for all defaulting obligations and taxes due the State of Kentucky. Section 112-5 of the General Statutes provides that the Attorney General himself shall bring this action, as Attorney General, and is a proper party to the action, on whose relation is may be brought; that he is a necessary party and a necessary counsel, has been frequently determined by the highest court in Kentucky. Without repealing any general law a statute was passed by the Legislature, which is a special statute, giving authority to the Internal Revenue Commissioner to collect taxes. This statute is void because Section 59 Constitution, requires that when a general law can *be enacted or is enacted,* concerning a subject matter of legislation, no special act will be constitutional. This Constitution also provides in Section 51 that before an amendment can be enacted, amending a general act, the original action must be recited in the statute which is repealed, then the amended statute must be reenacted as a whole. None of these provisions of the Statute were complied with, and at any rate, if the tax sought to be collected by the Commonwealth in this State action against the Central Company is to be considered a valid collection, then the Commonwealth is estopped from denying that the Auditor cannot bring this action. (Same law).

Numerous authorities will be cited under this heading to show the soundness of this contention, and that no defense of any kind, nor any motion could be filed before the motion for judgment was determined April 11, 1938, because it searches the record.

MOTION FOR JUDGMENT OF APRIL 11, 1938.

Record, page 2.

This motion was filed in response to an accepted challenge by the court that a judgment could be sustained on an issue for injunction and an issue on the merits of the case, and that the subject of an injunction as a remedy might be intermingled or joined with a suit to recover money on a mortgage, and a suit to recover money, had and received, and for damages. It was our contention that the application was, as the plaintiffs contended, a suit to recover money and damages, and that the suit in respect to an injunction was, like an attachment, an incident to a cause of action. We offered to put in evidence also affidavits showing that there was no service, but the court declined to act pending the consideration of the injunction, and left the action standing as it was on April 11, 1938. The Court has consistently held to his opinion, which under all the authorities, is without support.

Under the decision of the Erie Railroad vs Thomkins 304 US 64 the statutes which are hereinafter quoted became substantive law in this case. If a case had been on trial in a state court on the same record, an answer would have been necessary in spite of the motion to dismiss, although a demurrer would have

been the proper proceedure in the State Court, so that the motion for judgment on the pleadings, found all of the allegations in the petition, accepted and admitted when the case went to the three judge court, and this is the record at this time. Rec.

If this was not true, any judge of a District Court could defeat a jury trial on common law issues by denying injunction, enter a motion of dismissal of the petition, as to an injunction, and then claim that the merits of the case were disposed of. Both the Court of Appeals of Kentucky and the United States Supreme Court have uniformly held that a judgment in this respect would be no bar to proceeding to trial upon the merits, and the rules of the Supreme Court so provide. If the defendants had filed an answer setting up an equitable issue, there would be some reason in the court's contention, but not on this record. The Auditor should have sued, and the attorney general should have joined.

THE PARTIES DEFENDANT.

Before a motion to dismiss was filed in this case, an answer should have been presented showing that the defendant had authority to appear, and his counsel therefore had authority to appear, otherwise no motion to dismiss could be entertained. But that issue the Court denied of hearing.

Section 112-5 prohibits the employment of counsel otherwise than under this statute.

> "No State Officer, Board of Trustees or the head of any department or institution of the State shall have authority to employ or to be represented by any other counsel or attorney-

at-law, unless an emergency arises, which in the opinion of the Attorney General, requires the employment of other counsel."

This complete statute provides the method of the employment, the amount agreed on and the recordation in the office of the Secretary of State, which facts would have been determined by affidavits on the final hearing on the motion to dismiss, afterwards filed, and on the motion for judgment on April 11, 1938, and on the motion for summary judgment, denied by the court, all hearings denied by the court as to facts.

Section 112-7. Record of money collected, to be kept; Records to Governor.

"The Attorney General shall be required to keep in his office a book showing the exact amount of moneys collected by him from all sources, and due the State, and what disposition has been made of said moneys and he shall biennially on or before the 31st day of December, beginning with the 31st day of December, 1909, report to the Governor a full statement of the business done in his office and moneys collected by him and the dispositon made of same. He is empowered to purchase such books as are necessary to carry out the provisions of this section to be paid for out of the State Treasury."

Commonwealth vs. Roberta Coal Co. 186 Ky. Page 402.

"The applicable law may be found in section 1215 (now Section 112 to 115, Act of 1908, Chapter 32, Page 85, and again amended in 1934). He shall with the assistance of the Auditor of Public Accounts investigate the condition of all unsatisfied claims, demands, accounts and judg-

ments in favor of the Commonwealth, and shall take all necessary steps, by motion, action or otherwise, to collect or cause to be collected, such claims, demands, accounts, and judgments, and pay into State Treasury."

THE ATTORNEY GENERAL'S AUTHORITY.

The Attorney General had full authority to bring this action, but disappeared from the action because of liability that he would assume on his bond by the seizure of this property in the name of the Internal Revenue Commission. The authority, however, for appearing in this cause was given by the Internal Revenue Commissioner not to Harry D. France, Attorney for Com'sr, but there appeared private counsel, under a contract unauthorized by law. The decisions supporting our contentions are:

Gordon vs Morrow, 186-Ky. 717.

"Authority must be shown, or it is the duty of the Court to dismiss the action without predjudice."

Alexander vs. Wright, 3 AK M-189

Belt vs. Wilson 6 JJM 495

Com. vs. Louisville Property Co. 128 Ky. 790

4 Cyc. 928. Noble vs State 3 A. K. M.

FRANKLIN CIRCUIT COURT HAD NO JURISDICTION. (Sec. 976 Carroll's Code)

FRANKLIN CIRCUIT COURT JURISDICTION IN COMMONWEALTH CASES.

"The Franklin Circuit Court shall have jurisdiction, in behalf of the Commonwealth, of all cases, suits and motions against Clerks of Court, Collectors of Public Money and all public debtors and defaulters and others claiming under

them; and for this purpose its Jurisdiction shall be co-extensive with the State."

The Code of Kentucky, Section 117, provides:

"Pleadings of the Commonwealth must be verified by the official or agent who is authorized by law to have the suit brought."

The State Alcohol Liquor Board is composed of five members. They did not authorize the bringing of this suit, nor did the plaintiff show any authority for such action, State Court authorizing the Internal Revenue Commissioner, as an officer, to bring the suit, of attachment. If, as contended, they had a right to assess the taxes, (nor is it shown herein that they did assess the taxes at a hearing where notice was given to the Central Company ($1,400), of penalties which were attempted to be collected, without such hearing), but were assessed by a field agent and an attorney who had no authority to appear in the case, an employee of Clifford Smith (J. J. Leary). They must allege it. Thus it may be seen that if the Liquor Board had the authority to bring the action, it was necessary for the Revenue Commissioner to show certain facts, by some pleading to the court, inasmuch as service of summons was made on him, but if his default was clear on the record, no motion could be made for him to appear and answer unless he complied with the requirements of the Code, as recited herein. Motion for judgment on the pleadings therefore should have been the only matter to be considered after the motion to dismiss *was passed on by the three judges.* In other words the court should have called up the matter to determine the further proceedure in the case on the motion for

judgment, inasmuch as the motion to dismiss applied to nothing but the injunction.

Section 679 of the Carroll's Code provides:

> "The authority conferred by law upon three or more persons may be exercised by the majority of them concurring; and an act directed by law to be done by three or more persons may be done by a majority of them concurring."

Therefore, it has been held that a quorum of the Board of Tax Supervisors was authorized to perform the duties of the Board. This is the statute governing the assesment of taxes in respect to Boards in Kentucky, both local and State.

The Court of Appeals of Kentucky said, in the City of Corbin vs. Board of Education, Vol. 206, Ky. 787.

> "Action of the Board of Tax Supervisors is final, subject to right of appeal. The jurisdiction of the Board of Tax Supervisors is supervisory in its nature and unless express authority should be conferred elsewhere or Board should act arbitrarily or fraudulently, its work in supervising tax lists of assessors is final, subject only to right of aggrieved party to review its' action in his case by some method provided by statute."

No Jurisdiction Unless Trustee is Party.

Ex. N, C pgs. 9-44.

It is necessary to set up Denial by answer or defense to a pleading where a mortgage is alleged in a petition before there can be a claim of lien on the part of the Commonwealth or other person claiming a superior lien. Among the jurisdictional facts, in order to present *the right to appear* it was necessary for the

defendant to appear and set up his right to plead, which would have asserted defendant's lien in this case if any, and asserted the right of the Commonwealth to appear by proper defendant and by proper counsel. *These are all jurisdictional facts.* A motion to dismiss defeats only injunction relief.

Section 692 is authority for what is said, as a requirement of the Kentucky Code. No cross petition served by summons is necessary, and defendant will not be permitted to withdraw from the case or abandon a reply or answer so as to inform the court of the above facts. A motion to dismiss plaintiff's petition, unless the motion sets out these facts, will not lie, cannot be entertained by the court in respect to the merits of the action; and a motion for judgment, will, in the absence of such a pleading be sustained.

> "Sale of property cannot be made, and the judgment is void, unless it is made subject to the lien of the senior mortgage."
>
> Fisher vs. Evans 175 Ky. 300.
>
> Guill vs Corinth, 24 R-482.

The Court of Appeals has frequently held that where action is brought to foreclose a mortgage, and the petition shows that the mortgage is recorded, there can be no sale of the property or assets until the merits of the petition are disposed of. In other words, an issue may be set out in a petition, and if undisposed of by the judges, an independent action may be sustained *on this issue.*

A cause of action cannot be dismissed by mere motion to dismiss the petition, in respect to the grounds set out for injunction relief.

THE AUTHORITIES OF THE FEDERAL COURTS AND KENTUCKY ARE AGREED.

> "The principle that you can decide the merits of the case before deciding the pleadings, which control the evidence, I am unable to reconcile with any sound principle of law, for it may be, that jurisdiction may depend on the facts as shown under proper pleadings. This is not to say pleading may not be amended. Legislation, otherwise, within the scope of the acknowledged state power, not unreasonably or arbitrarily exercised cannot be condemned, because it curtails the power of individuals to contract ,but each separate power must be exercised and within a single statute. Raising revenue is the exercise of one power and it has slight relation to the exercise of police power."

And again it was said by the Supreme Court:

> "The obligation to pay taxes is not penal, it is a statutory liability quasi-contractural in nature, enforcible, if there is no exclusively Statutory remedy, in the civil courts by the common law action of debt or indebitatus assumpsit." Due process, Alaska U. S. 294-154.

Milwaukee County vs White Co. 296 US 268.

This is the law of *this Sixth Circuit,* and the motion to dismiss transfers to the law side where jury trial must be had.

Illinois R. Co. vs. R. R. Commission of Ky. 1 Fed. (2) 805;

> "Since we think the requirements of Section 266, Judicial Code (Comp. St. 1243) have been met by the hearing which has been had, and by the filing of this memorandum approved by the three judges, the order presently continuing the restraining order as herein directed, and the preliminary injunction to issue, if there is no further

showing to be made, will be entered *by the District Judge of this District, sitting alone. He will also pass upon the motion to dismiss the bill.* The court as now constituted may consider the *grounds* of such a motion as they *bear* upon the motion for injunction, but can make no order, *except to grant or refuse the injunction, or restraining order."* They could not issue order of dismissal.

Such is the rule in other districts.

Chandler vs. Neff.

298 Fed. Rep. 518: "Plaintiff contends that the Act of March 4, 1913, which now appears in the statutes as Sections 266 of the Judicial Code (Comp. St, 1243) having enlarged by statute the jurisdiction of a court of equity, and gives it a cognizance of suits which involve the constitutionality of an act of a state, in requiring the presence of three judges in passing upon a question of importance. The Purpose of this act was not intended to, and does not, enlarge the equity powers of this court. Generally speaking, the object of the statute was to limit the powers of a Judge of the U. S. District Court, who theretofore had passed upon the constitutionality of state laws, and had exercised *singly* the right to award or withhold injunctions as to their enforcement. The amendment, so far as the presence of three judges is concerned, limits their functions to hearings upon the question of issuance of temporary interlocutory restraining order, and does *not extend to the case on its merit.* Before the additional judges should be called to the assistance of the District Judge sitting in the case, it must appear from the allegations in the petition that a cause of action is stated, which on its face, entitles the plaintiff to the relief sought; therefore the court as now constituted is authorized to judge of the sufficiency of the plaintiff's petition in point of law. The court sustains the first ground mentioned."

Counsel for defendant by proceeding in the Circuit Court of *Franklin County,* seems to be of the opinion that the case in the Federal Court has been disposed of. There was no final decree. What was determined was merely the right of injunction. So decided the Supreme Court. That, having been determined, the order of dismissal applies alone to that right, and other causes of action even in respect to taxes remain. That this was squarely decided in the 9th Circuit in the Case of City and County of San Francisco vs. McLaughlin, 9 th Fed. (2) 390, there is no doubt. (Denial of injunction not final order).

> "Order granting motion to dismiss bill in equity under equity rule 29, unless followed by final decree, is not final order."
>
> "Under Equity rule 29, demurrers are abolished and every point of law arising upon the face of the bill, whether for misjoinder, nonjoinder or insufficiency of fact, to constitute a valid cause of action in equity, which may heretofore have been made by demurrer or plea, shall be made by a motion to dismiss, or in the answer. The *mere granting of a motion to dismiss under this rule, unless followed by a final decree,* amounts to nothing more than a determination on the part of the court that the bill is open to one or more of the objections urged against it, and the order on the motion was not final, any more than is an order sustaining a demurrer to a complaint in an action at law. In either case the suit or action is STILL PENDING; and must be determined by final decree by judgment before this court can acquire jurisdiction by appeal. Counsel for appellant seems to nave labored under the impression that a final decree had been entered. The appeal must therefore be dismissed for want of jurisdiction."

NO DETERMINATION OF THE MERITS.

The 2nd Circuit Court of Appeals, decided the same in the case of Harrup vs Stoneham, et al; (lost citation).

> "A decision or order to be appealable under Judicial Code 128 must be not only valid but complete, and final as to all parties, and whole subject matter, and all causes of action involved."

The cause of action here involved, to-wit, *the foreclosure of the mortgage* was not considered at all in the motion to dismiss as shown above. The court, discussing that question, in the above case says:

> "The decision under Judicial Code 128 must be final. The decision or order must be not only final, but complete and final. Not only as to all parties, but as to the whole subject matter, and as to all of the causes of action involved."

This question was decided in U. S. Supreme Court, in Collins vs. Miller, 252 U. S. 364, at Page 370, 40 St. 347, (64 L. Ed. 616) and in Stromberg vs. Arnson, 239 F. 891, (153, C. C. A. 19). In the Collins case the court said: Petition Ex. C. Co. pg. 47.

> "It is the duty of this court in every case in which its jurisdiction depends on the finality of the judgment under review to examine and determine whether the questions raised by the parties are decided. The judgment must be not only final but complete, and the rule requires that the judgment to be appealed should be final not only as to all parties but as to the whole subject matter, and as to all the causes of action involved."

Ia. Navigation Co. vs. Oyster Commission 266 U. S. 99:

> The court again said, "If a judgment does not finally dispose of some elements of the con-

troversy, unless it is final on its face as to the entire controversy, this court will not review it.

The Court further says in the opinion: "We must look to the judgment for the purpose of ascertaining its finality."

Norfolk Turnpike Co. vs. Va. 225 US 264.

"Where equitable and common law actions are shown in one petition and a motion to dismiss is made, the bill shows no grounds for equitable relief."

Ansehl vs. Puritan Co., Hunter vs. Glade, Fed. Life Insurance Co. (8) 103 F. (2) 192.

"The Court, where a motion to dismiss is sustainable may deny the motion and direct the plaintiff to amend his bill."

Swift vs. Inland Navigation Co. 234 Fed. 375.

Rule 29.

"The motion to dismiss must therefore be denied, reserving to the defendants the right to take by answer whatever advantage might otherwise have been secured by the motion. Rule 29 permits any point of law which goes to the cause of action, as stated in the bill, to be called up and disposed of at any time until the final hearing at the discretion of the court.

"The preliminary motion to dismiss must be denied, unless it is shown by the allegations, which are taken as true upon final hearing, cannot be sustained."

O'Keiffe vs. New Orleans, 273 Fed. 560 and 280 Fed. 92 8th Circuit.

"Judicial Code 266 requiring that motion for a temporary injunction to restrain the enforcement of a statute by an officer to be heard by 3 judges *is inapplicable on motion to dismiss the complaint,* which, under rule 29 is equivalent to

a demurrer on the bill, if the motion is refused and no answer be interposed, the decree would be final, and a final injunction would issue. Where an interlocutory injunction is applied for under section 266 a *motion to dismiss may be interposed before the single judge.* Section 266 applies only to temporary injunctions. If the motion to dismiss is entertained and sustained, it should be adjudicated by the judge of the court and under the rules and practice amendments should be allowed to the complainant."

Supreme Court of the United States, *in this cause,* held:

"Apart from that question, the Commonwealth insists that appellants had a plain adequate remedy by appearing in the attachment suit in the Franklin Circuit Court where all issues as to the validity of the tax and the propriety of the proceedings for enforcement could be litigated and determined, with the ultimate right of review in this court. Then a Federal question raised and decided. Appellants also state that in the present suit they asked the Federal Court to exercise its equity powers in their aid in the foreclosure of the mortgage, but it is apparent that this relief is merely incidental, and that the main object of the suit is to restrain the proceedings in the Franklin Circuit Court which had been brought to enforce the collection of the taxes." The main object was foreclosure taxes and damages.

A suit on a note is a common law issue under the rules of procedure in Kentucky.

"The section of the Federal statute which prohibits the maintenance by plaintiff of a suit in equity where an adequate remedy at law is available may not maintain a suit in equity if he has opportunity to impose a defense at law or as an action that might be maintained at law in an independent suit."

The decision of the three judge court is a bar to the action of the District Court in denying the right to docket the case.

MOTION OF DEFENDANTS

> "And as reasons for said motion state that plaintiff's herein have a plain, adequate and complete legal remedy, and that this court is without jurisdiction to grant the relief prayed for in plaintiff's petition as amended."

The Court said in its order:

> "It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act" furnishes petitioners and adequate remedy in Section Twelve (12) (Fol. 47) of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act."
> C. Pet. pg. 87.

NO OTHER REMEDY AND NO OTHER OPPORTUNITY.

The trial court denied the introduction of any evidence for the purpose of determining the jurisdiction of the court after the mandate had been returned to the District Court and arbitrarily refused a hearing on the summary judgment so that the petitioners herein, have been compelled to make as a part of the petition for certiorari the evidence in the case and the orders of the Court in the case of J. W. Martin et al, vs. Central Distributing Co., et al with the plaintiffs in this action having specially appeared in that action, and the controversy being between the same parties on the same subject matter we consider that we have a right to make such orders and such evidence, as was adduced there, a

part of the petition in this action, since we would have no other remedy. The appearance in the State Court was exclusive of consideration of the merits at the time of the appearance of the plaintiff's in this action in order to raise our objections to the jurisdiction of that court.

And in this connection we show that the court of Appeals of Kentucky has frequently decided that there is no pending action in the State Court in respect to the plaintiffs, and that the Franklin Circuit Court has no jurisdiction as shown on page 20 of the petition of the Central Distributing Co. (Harry Bayer) and on Page 19 of said petition (Eleanor Webster), and on page 17 of (William Ploss), service agents, and on page 16, showing the order of attachment issued to (William Ploss), service agent, directed to one Phillips, Sheriff of Franklin County; and service on Harry Bayer who was no officer of the Corporation, signed by Louis C. Sickmeier, a person to whom the order of attachment was not directed and no explanation of his authority.

ATTACHMENT ORDER

"A public offense, of which the only punishment is a fine may be prosecuted by penal action, under Section 11 of the Criminal Code in the manner provided for Civil Action, but where the penalty is a fine and imprisonment, the action must be brought where the offense was committed under indictment and by the Commonwealth Attorney. But an action which requires a plea of "not guilty" is not such an action as may be brought where the offense was committed under indictment and by the Commonwealth Attorney." See Section 11 of Criminal Code and Section 469 of said Code Title 1,

L. and N. vs. Commonwealth 112 Kentucky Page 640.

Commonwealth vs. Avery 77 Kentucky 625

Morrell vs. Commonwealth 129 Page 729 198 S. W. 762

Boyer Wheel Co. vs. Taylor Co. 104 Page 742

106 page 165

18 Ky. Rep. 647

104 Ky. 726

104 Ky. 735

Helm vs. James, 129 Ky. 239

Com. vs. Long 30 S. W. 629

Stat. Sec. 22 Act. April 30-36, fine $1000 jail one year.

The imprisonment clause is as follows:

SECTION 22, ORIGINAL TAX ACT: (1936) PENALTY CLAUSE.

"In addition to the remedies herein granted, the Commonwealth for such violations, any person who shall violate any of the provisions of this act will also be deemed guilty of a misdemeanor and punished by fine of not less than $50.00 nor more than $1000.00, or by imprisonment of not less than 30 days nor more than one year, or by both such fine and imprisonment."

AUDITOR MUST SUE.

Section 10 of the Original Act 1934:

"On the failure of any person, liable therefor, to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall be deemed delinquent, and a penalty of twenty per cent on the amount of license tax due shall attach, and the *Auditor* shall at once

cause such proceedings to be instituted for the collection of such license, with such interest and penalties as may be provided by law for the collection of other taxes."

In the Morrell Case it is said:

"The business was carried on in the county in which the proceeding was instituted (this is right). The offense consisted in carrying on the business in violation of law. In case of this kind the cause of action occurred where the act was done. The Act here which entitled the commonwealth to demand the penalty was committed in Franklin County, and this court had jurisdiction."

"Sections 4028-29 provides that the penalty must be enforced or may be enforced in the county where committed. ALL PENAL ACTIONS must be prosecuted by the Commonwealth's atty. Section 4281 Statute

Atterbury vs. Waldeck 207 Ky. 618.

Commonwealth vs. Grand Central 97 Ky. 325

Harris vs. Beaven 11 Bush 254

Thompson vs. Carr 13 B. M. 215

NO PERMISSION GIVEN TO SHOW THE ATTACHMENT VOID, BECAUSE NO LEGAL PETITION WAS FILED IN THE STATE CASE. Denials of Equal protection. (pg. 16, C. C. petition).

"The filing of a petition and service of summons on an officer of the corporation or the service agent at or before the filing of the attachment cannot be waived."

Appleton vs. Trust Co., 244, Ky., 253.

"An attachment must be served on an officer of the corporation at its place of business or on the service agent designated by statute (this

service agent was William Ploss). If there is no allegation that a summons has been returned with the endorsement of service on an officer of the corporation or the service agent, attachment is void."

Redwine vs. Under, 101 Ky., 190, 72nd section of Carroll's Code of Kentucky.

"In order to acquire jurisdiction, the petition must be filed and summons must issue and be served concurrently with attachment or before attachment." Kelly vs. Stanley 86 Ky. 240.

Sec. 2524 Carroll's Statutes.

The remarkable action of the both the Circuit Court of Appeals and the District is not to be accounted for on any reasonable legal hypothesis. The District Court was arbitrary, and the Circuit Court of Appeals would make no findings. The law fitting both courts is aptly termed by the Supreme Court of the United States, referring to a state Board in each case.

"So long as the right to make a full defense is not cut off, the Act is not rendered unconstitutional and does not deny the equal protection of the law."

But here is an absolute denial in the Circuit Court of Appeals to allow an appeal from the District Court and denial of a mandamus to require the court below to perform a positive right. Neither of them would make findings, so Plaintiffs come to the Supreme Court of the United States in the dark.

Mobile Railroad Company vs. Turnpike Co. 219 US 35

170 Federal 1023 (same case)

Lindsley vs. National Carbonic Co. 220 US 63

The Supreme Court of the United States in the—

Ohio Tax Cases 232 US 576, said:

"The issues made by the petition extends the jurisdiction of all questions presented, irrespective of whether it is necessary to decide them all."

So this court in a Kentucky case decided the same thing.

L. and N. Railroad vs. Finn 235 US 601.

The Kentucky Code provides that on the merits there must be an issue made and tried where petition states a cause of action, and no judgment may be had where there is no defense filed if the petition states a cause of action, proceeding must be exparte from the 30 days after default, and so this is the Federal rule.

In Deitch vs. Southern Railroad 53 Fed. (2) 97

Kentucky and Tennessee Power Company vs. City of Paris 48 Fed. (2) 795

Fordson Coal Co. vs. Jackson 7 Fed. (2)

Asher vs. Fordson Coal Co. the Court held, in 249 Ky., 117, that a judgment rendered where there was no revivor of the action, the judgment rendered was void, whether issues were made up or not.

The Federal Statutes and rule 60 provide that six months default ends the pleading, and the cause, so far as the party in default is concerned.

Texas vs. Wilder 92 Federal (2) 933, is fatal to further pleadings and must be complied with.

The Court of Appeals of Kentucky decided that

where an action was not brought in the place where the corporation was doing business there could not be a valid judgment, and injunction would lie.

Barbour vs. Newkirk 63 Ky. 631

Life Ins. Co. vs. Edwards 247 Ky. 136

Bankers Life case 254 Ky. 686

If the petition would be good against a special demurrer, a cause of action is stated, and the merits must be determined, if not the dismissal order is a void judgment.

Bruslove vs. Corson 176 Ky. 829

Central Distributing Company in their motion for JUDGMENT on the record shows that their judgment was good.

> "The Defendants, now, Central Distributing Company, Inc., move the Court for JUDGMENT on the issues made by the pleadings on the issue of jurisdiction, and on the issue involving the merits of the case."

The Petitioners joined in the same motion after return of the mandate, but the court refused to hear any facts or make conclusions of law on such an issue. There are two pages of grounds alleged here, which called the courts' attention to all issues.

Brown vs. Pacific Mutual Life 62 Fed. (2) 711

A MOTION TO DISMISS WAS FILED; FINDINGS WERE PROPOSED TO THE DISTRICT COURT AND CONCLUSIONS OF LAW: DENIED.

Under the law there is no final judgment rendered in this cause, so that Certiorari will lie, and ought to lie with direction.

Eastman Kodak Co. vs. Gray, 292 U. S. 337

In this case the Court says:

"Special findings requested which raise legal propositions presented to the court require ruling, which will cause the case to be remanded if not made." (Ex. F. pg. 42, C. Co. petition).

Lewellyn vs. General Elec. Co. 275 US 243

Hardey vs. Malley 288 U. S. 415
General Motors vs. Swan 44 F (2) 24
Gerlach vs. C. R. and P. RR. 65 Fed. (2) 867

Hawthorne vs. Bankers' Life Co. 63 F. (2) 971

Merrian vs. Kusselman 45 Fed. (2) 983
28 USCA Sec. 773

Interstate Life vs. Klaber 50 F. (2) 154
American Surety Co. 58 Fed. (2) 234

Such denial as amounts to no hearing when the facts are necessary to determine jurisdiction is a denial of the equal protection of law.

Lindsley vs. National Carbonic Company 220 U. S. 63

Mobile RR Co. vs. Turnpike Co. 219 US 35

FACTS DETERMINE JURISDICTION—MUST BE A HEARING:

"No judgment of a court is due process of law, if rendered without jurisdiction in the court and notice to the opposing party according to

law — according to the principles in enforcement of private rights."

Scott vs. McNeal 154 US 34

Windsor vs. McVeigh 93 US 274

Taylor on Due Process Sec. 138

The facts alleged in a petition are admitted on a motion to dismiss, and if a cause of action is stated, petition will support a judgment. Motion for judgment must be acted on.

Royal Indemnity Company vs. Woodbury Granite Co 101 F. 689

Globe Steel Co. vs. National Metal 101 Fed. (2) 489

Original Statute did not permit of Appeal from a judgment or decree on the allowance or denial of an interlocutory injunction, but since the Amendment and section 266 such an appeal is allowed and further action may be stayed on the merits, or, the District Court may proceed.

"It is well settled that a case may not be brought (Supreme Court) here except when the decree is complete and final as to all parties and the subject matter, and as to all of the cause of action."

Hohorst vs. Picket Co. 148 262 (Ex. Q. pg. 46, C. C. pet.)

Onedia Navigation Corp. vs. Job 252 US 521

Arnold vs. US 263, US. 427

Thompson vs. Murphy (8th Circuit) 93 Fed. (2) 38

Findings or Conclusions of law must be made to determine the decision of the Court.

Hobbs-Westinghouse Co. vs. Employer's

Liability Corp. 102 F. (2) 32

Baldwin vs. Higgins 100 Fed. (2) 405

If there is one cause of action remaining in the petition the decree is not complete nor is it a final judgment.

Kilmer vs. Griswold 67 Fed. 1017

Hill vs. Chicago RR. Co. 140 U. S. 52

Ex Parte Enameling Co. vs. 201 US. S. 156

THE STATE LAW OF KENTUCKY AS TO PLEADING CONTROLLED UNLESS PROVIDED FOR IN THE FEDERAL RULES OR STATUTE:

An answer to an interlocutory petition must be filed but cannot be sustained unless a controverting affidavit is filed.

Rules, 27 Vol. C. C. A. reports
Shumaker vs. Security Co. 159 F. 113
Pleadings must comply with state practice.
Rev. Statutes Sec. 914 U. S. Compiled 1901, page 684

In Webber vs. Webber I Metcalfe 18, it is held that an attachment order must be served by the officer to whom it is issued.

In Case vs. Colston I Metcalfe 145, it is held, under the Code, service, of a summons must be made by any officer who is authorized to serve process, but an attachment order directed to a Sheriff or other officer must be served by the officer to whom it is

directed, or the attachment is void. Thomas vs. Mahonney 9th Bush 111—Speckert vs. Manderson, 79 Ky.

The leading authority in Kentucky followed by the Court (667 Code 509) is the case of Taylor vs. Breeze 63 Fed. 678 in respect to interlocutory orders, and this court never held otherwise than that the merits must be tried out and may be tried pending appeal or allowance in respect to such injunction..

The Taylor vs. Breeze case holds: "Interlocutory does not mean to decide the cause but that which decides a temporary remedy and before a final hearing on the merits."

> The Court says: "Let the case be remanded for such failure with permission to make such defense to the petition as they find proper."

We therefore respectfully SUBMIT that in the interest of Justice and a fair administration of the law this case should be remanded with directions to determine the issue and permit the introduction of evidence, otherwise it will not be done by mere reversal of the acts of the court. This court must in a very specific way tell the trial court what the law is and what must be done—follow the plain written decisions and statutes governing the case.

Respectfully,
HARVEY H. SMITH,
Attorney for Petitioners.

I confirm:
GEO. E. WHITMAN,
Attorney for Central Co.

Note: Record pages will be supplied.

Supreme Court of the United States

OCTOBER Term, 1940

No. 333

Petition For Certiorari

J. W. KOHN, M. S. KOHN and
J. W. KOHN, Administrator
of the Estate of CARRIE KOHN,

Petitioners

vs.

THE HONORABLE MAC SWINFORD,
Judge of the United States
District Court for the Eastern
District of Kentucky, and the
HONORABLE XEN HICKS, Presiding
Judge of the Circuit Court of
Appeals in and for the Sixth
Circuit, and the respective Courts:

Respondents.

In the case of : J. W. Kohn, et al, vs. J. W. Martin, et al.

HARVEY H. SMITH,
Attorney for Petitioners,
Covington, Ky., and
Cincinnati, Ohio.

(This separate petition of the Petitioners joins in the application of the defendant, Central Distributing Company, Inc., for Writ of Certiorari to the Respondents, represented by Frank M. Dailey, Frankfort, Kentucky).

For Defendants and Petitioners
Brief at Page 11

10 Collection of penalties ceased under repeal of the Act of 1934. (Paragraph 12, pages 8 and 9)

11 Act of April 30, 1936 and 1938 void. (Unconstitutional.) (Paragraph 13, page 9)

12 Refusal of the United States District Court to examine jurisdiction or hear a jury trial. (Paragraph 14, page 9)

13 Denial of due process, denial of appeal, denial of mandamus, refusal to docket and try the issues, denial of due process and equal protection of the laws; refusal to strike the name of J. W. Martin, and attorneys, resigned officer, denial of due process. (Paragraph 15, page 10)

14 Denial of jury trial under Judicial Code, Section 773, on controverted issues. Denial of equal protection of the laws of Kentucky. Section 20, 509 Code. (Paragraph 16, page 11)

15 Double collection of import taxes—contrary Kentucky Law and Article 1, Section 8. (Paragraph 16, page 11)

BRIEF

Authorities on page 12, section 238, concerning writ of Certiorari. On pages 12, 13, 14, 15, and 16 are the authorities showing that the judgment of April 16, 1938, is void as to the merits, and merits must be tried.

On page 17 are citations showing the right of a single taxpayer to collect either as assignor or assignee or both or one for all.

Page 18, Prayer.

Substitution of revivorship. If none in six months, judgment void. United States Rule 25. Not made within twelve months, judgment void; if entered without revivorship, void. (Ky.)

Asher vs. Fordson Coal Co., 249 Ky. 498.

Fordson Coal Co. vs. Jackson, 7 Fed. (2) 117.

Attorneys of record could not appear—not attorneys for auditor. Sec. 10, Act of 1934. 145—112 Ky. Statutes.

SECTION OF THE JUDICIAL CODE U. S. A.

Judicial Code, 238.
Annotated, 345.
Judicial Code, 237.
Annotated, 344.—5.
Judicial Code, 57.
Annotated, 118.

STATEMENT OF JURISDICTION AND INDEX TO POINTS IN THE PETITION

1 The Three Court judgment of dismissal rendered at Louisville April 16, 1938, is void for the following reasons:

(a) The court could render no judgment out of the Eastern District.

(b) The court decided that petitioners had an adequate remedy at law. (Single Judge denied it).

(c) This action had precedence of the state suit.

(d) Must be rendered by single Judge.

(Paragraph 1, page 1 and 2)

2 United State District Court for the Eastern District had no jurisdiction.

(a) No service on the Central Distributing Company, Inc.

(b) No service on the trustee.

(c) Trustee not a party to the action.

(d) Franklin Circuit Court was without jurisdiction. (prison penalty).

(Paragraph 2, page 3)

3 (a) State could not attach assets in the hands of a trustee under Kentucky law.

(b) Summons issued to service agent not served.

(c) Import taxes violate Article 1, Section 8, 14th Amendment, and Article 3, of the Bill of Rights of Kentucky.

(d) Mortgage foreclosure of $3000 or more must be adjudicated or there is a denial of due process and an impairing of contract rights.

(Paragraph 3, page 4)

4 (a) The consumers' tax attempted to be collected violates sections 171, 172, and 174 of the Constitution of Kentucky, and Article 1, Section 8, of the United States Constitution

(b) State auditor must be a party to the action. (145 Kentucky Statute).

(c) Foreclosure the main action—injunction plaint incidental.

5 The tax act of 1936—April 30—controlled tax and controlled parties to the action, which was the auditor, not the revenue commissioner (see 112—1—5, Kentucky Statutes). (Sec 10, 1934 Acts).

(Paragraph 5, page 5)

6 Denial of Jury—USCA 780. Rule 25.—Jurisdictional in Campbell County, not Franklin County.

(Paragraph 6, page 6).

7 Motion for judgment April 11, 1938.

(Paragraph 8, page 7)

8 Judgment at Louisville void.

(Paragraph 9, pages 7 and 8)

9 No findings of fact.

(Paragraph 11, page 8)

Supreme Court of the United States

——— Term, 1940

No. ———

Petition For Certiorari

J. W. KOHN, M. S. KOHN and
J. W. KOHN, Administrator
of the Estate of CARRIE KOHN,

Petitioners

vs.

THE HONORABLE MAC SWINFORD,
Judge of the United States
District Court for the Eastern
District of Kentucky, and the
HONORABLE XEN HICKS, Presiding
Judge of the Circuit Court of
Appeals in and for the Sixth
Circuit, and the respective Courts:

Respondents.

In the case of : J. W. Kohn, et al, vs. J. W. Martin, et al.

To the Honorables; the Judges of the Supreme Court of the United States:

Come now the petitioners and for grounds supporting their application for writ of Certiorari, allege and say:

1. That heretofore this action was appealed to the Supreme Court of the United States, and is case No. 177, entitled as above, except the defendants therein named were the Commonwealth of Kentucky and James W. Martin, Revenue Commissioner of Kentucky on his relation as said official to said

State. This appeal was from a judgment of the three judge court assembled at Louisville, in the Western District of Kentucky, on April 16, 1938. The Honorable Mac Swinford, Presiding Judge of the Eastern District insists and decided on the 27th day of February, 1940, that the judgment denying injunction determined the entire merits of the case, and that the three judges who sat at said time had the jurisdictional right to determine all of the issues, when as a matter of fact your petitioners contend that the three judge court judgment was void because the court could not sit in the Western District of Kentucky, in a cause originating and pending in the Eastern District. That the judgment dismissing can only be signed by a single judge, and not by the three judges; under Section 266, the three judges could merely deny the injunction and refer the case back to the single judge. The single judge never entered the motion for judgment dismissing the cause of action. (Revised Statutes, U. S., Section 581-case U. S. 14 Fed. (2) 510 - In Re Briggs, 15-88 Fed. (2). Case vs. U.S. Bland vs. Kenamer - 6(2) F. 130

This District Court entered a degree that the plaintiffs, J. W. Kohn, et al, who were seeking to foreclose a mortgage on assets in Campbell County, Kentucky, and to recover otherwise judgment for an unsecured debt for $22,000, were foreclosed in trying the issue thereafter in the District Court by the said judgment, which found that they had an adequate remedy at law in said court or in the State court, whichever court had first secured judisdiction of the subject matter. Your petitioners claim that by filing their suit on the 26th day of February, 1938, and having served James W. Martin and the Commonwealth of Kentucky on or about said date, that this

cause of action had precedence over a cause of action brought in the State against Central Distributing Company, Inc., wherein the Commonwealth of Kentucky, by James W. Martin, sought to seize the entire assets of said corporation, which suit was filed on the 16th day of February, 1938, in the Franklin Circuit Court of Franklin County, Kentucky.

2. Your petitioners say and allege that no service was ever had on Central Distributing Co., Inc., because no officer of the corporation was served, and the service agent was not served. This is an absolute defense under the State laws of Kentucky, which bind this court under the decisions of Erie Railroad Co. vs. Thompson. The second reason why the Franklin Circuit Court had no jurisdiction was because Harry Bayer had been appointed trustee or bailee by agreement between Central Distributing Co., Inc., and your petitioners, and it is the law of Kentucky, and was then, that no attachment can be run or issued against property in the hands of a trustee or bailee. This is, in Kentucky, regarded as a foreclosure proceeding, and has the same force and effect as a receiver. The third reason why said court had no jurisdiction was because the Constitution of Kentucky gives the Franklin Circuit Court only such jurisdiction as it had at the time the Constitution was adopted in 1891. This jurisdiction, as repeatedly decided before and since, was limited entirely to civil penalties under a civil penalty statute for the collection of moneys due on bonds of public officials; and that therefore, this court had no jurisdiction of the subject matter. Another reason was that the property was under mortgage which was duly recorded at the time the attachment was sued out and a court can obtain no jurisdiction of such

an action until the mortgagee has been made a party to the action, although in the month of May, this was attempted by the defendant, James W. Martin. No proper service was ever had.

3. But your petitioners appeared in the Franklin Circuit Court and challenged by special demurrer and motion to quash the jurisdiction of said court. These motions were denied out of order and without permission to present any proof by the said Judge presiding in said court. That your petitioners are citizens of Ohio, and were seeking to foreclose a mortgage in excess of $3000.00, and that the action of the Franklin Circuit Court and James W. Martin, an administrative officer of the Commonwealth of Kentucky, amounted to the destruction and to the impairing of the obligative contract between the Central Distributing Company, Inc., and your petitioners, and that therefore, such action and such imposition was in violation of the 14th Amendment, and that the taxes sought to be collected were partly import taxes, which it is claimed the State, under a 1936 satute, had a right to collect. Your petitioners contest this right by saying that the statute, is void because it requires the payment of an import tax before movement of the merchandise into the State of Kentucky, and that the same is prohibited also by the Constitution of Kentucky in Article 3 of its Bill of Rights, which prohibits the levying of the tax on property not within the territorial limits of the state. The Legislature has no power and no authority to amend the Bill of Rights of the Constitution of Kentucky, and the said provision remains a self-executing law of the Commonwealth.

4. That at the same time a part of the taxes

attempted to be collected from the said Central Distributing Co., Inc., was a violation of Sections 171, 172 and 174 of the Constitution of Kentucky, which provided that taxes must be levied on the *fair cash value* of the property, and that these taxes as levied must be uniform under a proper classification, and that they must not be discriminating, and that they must not be confiscatory, and that the tax as levid must not be a second tax of the same kind, levied on the same property. That this tax attempted to be collected was a tax collected the second time as an excise import tax. That, as levied, it was a violation of Article 1, Section 8, of the Constitution of the United States, and of Section 3 of the Bill of Rights of Kentucky. That to deprive your petitioners of their property by a lack of due process procedure in the State of Kentucky was to present a Federal Constitutional question to this court for its determination in addition to impairing their contract.

THE STATE AUDITOR WAS ONLY PARTY WHO COULD SUE. (Sec 20) Act 1934

5. That at the time said attachment was run on the assets of the Central Distributing Co., Inc., as alleged, the title to the property had passed to the Trustee and your petitioners, and the defendant, Central Distributing Co., Inc., had no assets on which a levy could be made, and that this fact must be determined, and the fact that jurisdiction of the seizure by the Franklin Circuit Court must be determined by the United States District Court for the Eastern District of Kentucky, which it refused to do; and that it had constructive jurisdiction and control of the res, which was the property of your petitioners, and not the Franklin Circuit Court, because of the priority of the Federal suit as between J. W. Kohn, et al, and J. W. Martin, official of the State of Ken-

tucky, and that said Trustee was never a party to the action.

6. That the laws of Kentucky in many respects are controlling in this litigation, and that such laws provide that a trial by jury, when demanded, makes void any judgment rendered by a court unless, specifically, in writing, a jury is waived. That the Franklin Circuit Court denied the right of trial by jury on the common law issues of fact, which divested it of jurisdiction, if it ever had such jurisdiction. That also there was no party plaintiff at the time of the trial of that action because there had been no revivor under the laws of Kentucky, which are the same as the laws governing the United States District Court, except that in Kentucky the time to revive, is within twelve months, and it is six months in the Federal courts. U. S. C. A., Section 780, Rule 25. That furthermore, under the laws of Kentucky, a suit must be filed or brought in the county where the place of business of the corporation is located, and the business was located in Campbell County, and furthermore, the alleged offense committed by the Central Distributing Co., Inc., if any, was for the non-payment of these taxes, both the consumers' taxes and import taxes. The Consumer's tax of $1.04 per gallon is imposed, not as a matter of right, but is imposed on the condition and when sales are made without the payment of the tax, and thus the offense would be committed where the sales were made and criminal, and the obligation arises where the sales are made. These sales were made, if any, in Campbell County, and these sales must be proven, and therefore become a Common Law issue of debt to the State only when such sales are made.

8. But the Honorable Mac Swinford, United States District Court Judge denied a hearing or an examination of the facts involved in this entire service, on said assets, inclusive of the determination of the jurisdiction of the court on any of the grounds alleged. A motion was made by the Central Distributing Co., Inc., defendant, for a hearing on these issues and for judgment as the record stood at the time of making this motion. The court refused to pass upon this motion, or consider it.

A motion was made by your petitioners for judgment, joined by Henry J. Cook, Attorney for the Central Distributing Co., Inc., on the 11th day of April, 1938, and sworn affidavits were introduced in support of said motion, but the Court did not render judgment on this motion because the Court had declined to sustain the motion to transfer the cause to three judges. On the 12th day of April, 1938, the Circuit Court of Appeals for the Sixth Circuit, reversed it, and on the 12th day of April, 1938, the District Judge ordered the cause submitted to a three judge court in the city of Louisville, state of Kentucky, *outside of the District.*

9. That it is the contention, and it is alleged by your petitioners that the judgment at Louisville, Kentucky, was void because it was outside of the District, fixed by Federal statute which prescribes where district courts may sit and where judgments may be rendered; and there is no provision in said statute that such a judgment may be rendered outside of the District, which sitting was objected to by your petitioners, and which exception to said judgment rendered at said sitting was duly made by your petitioners, and is shown in the Exhibits attached to the petition of the Central Distributing Co., Inc.,

10. That, as decided in said judgment of April 16, 1938, at Louisville, your petitioners had an adequate remedy at law. Under the authority of this court, it was their duty to remain in the United States District Court and move for trial of these issues, in respect to the foreclosure of their mortgage; in respect to the recovery of their taxes, it being provided in the decision, it was under Section 12 of the 1934 Act, which Section provided *that such an action might be brought in the United States District Court for the Eastern District of Kentucky.* That on this finding, this Honorable District Court had jurisdiction, and it had exclusive jurisdiction, because the action was brought prior to the action in the State Court *in respect to your petitioners.*

11. That a judgment is void in Kentucky unless supported by findings of fact, and under Federal rules 52 and 70½, but the Court here made no findings, though demand was made by plaintiffs, and the Judge refused filing of plaintiffs' motion for findings.

12. That pending this litigation on March 7, 1939, the Legislature repealed the Act of 1934, which created the Central Distributing Co., Inc., as a licensee, which was invalid. That it is the law of Kentucky, and was then, that where penalties are attempted to be enforced under a statute, and the statute is repealed pending the litigation, the penalties cease and no longer exist as an item of recovery. That if an act should attempt to carry them over, which was not done, it would be retroactive in its nature and void, and that the attempt here made to collect said taxes was a void proceeding, and established a misjoinder of actions, making it necessary

for state plaintiffs to revise their said petition in the State Court, if the Court had jurisdiction, dismissable on demurrer.

13. That the Act of April 30, 1936, and the Act of March 7, 1938, are both void and invalid as laws of Kentucky, authorizing the collection of said taxes, and as they were enforced by the defendant, James W. Martin, et al, such action constituted denial of due process of law, and a denial of the equal protection of the laws of the United States, and was repugnant to the 14th Amendment and to Amendments 4, 5, and 7 of the Constitution of the United States, in that the action of the said United States District Court was a denial of due process and a denial of the right of trial by jury on the issues propounded in the pleadings.

14. That the refusal of the United States District Court for the Eastern District of Kentucky, denying the filing of pleadings and denying the docketing of the cause, and refusing to make findings, and refusing to adopt the findings filed by your petitioners, was a denial of due process and of the equal protection of the laws of the United States, and in its refusal to follow the decisions of the highest court, the Court of Appeals, of the State of Kentucky, in respect to the said taxes attempted to be collected, and in respect to the enforcement of the note and mortgage of your petitioners, amounted to denial of due process, and was repugnant to the decisions of the Supreme Court of the United States, and the statutes made and provided for jury trial in Courts of Law.

15. That the refusal of said court, the United States District Court, to try the damage action for seizure and destruction of the said business, precipitated by your petitioners in their original and amended petition, was also a denial of due process and the equal protection of the laws of the United States. That your petitioners demanded a trial by jury, and never waived the same, and furthermore, on the ruling of the court, presented their notice of appeal to the Circuit Court of Appeals, which notice the said United States District Court refused to file, and the application made to the Sixth Circuit Court of Appeals to allow said appeal, which was denied, and the petition for mandamus which was made to the Sixth Circuit Court of Appeals to require the United States District Court to docket and try said cause, which mandamus was denied, was also a constitutional denial to petitioners.

In all of these respects the United States Circuit Court of Appeals for the Sixth Circuit, and the United States District Court for the Eastern District of Kentucky, constitute, and is a denial of due process and the equal protection of the law; and also a refusal on the part of the Circuit Court of Appeals to issue its mandate directed to the said United States District Court to docket and try said cause and accept the issues as made by the basic facts of the pleadings, and in its refusal to mandate said court to strike the pleas of counsel for the plaintiffs, J. W. Martin, and the Commonwealth of Kentucky, from the records of the court, and deny said pleas, they having been in default for more than six months in their pleadings, after the motion for judgment on April 11, 1938, made by your petitioners, and in the refusal of the said United States District

Court to render judgment for your petitioners, as by default, on their motion pro-confessed, the said Commonwealth of Kentucky and James W. Martin having disappeared under the laws of Kentucky as parties to this action and under the statutes of the United States, and the allegations of plaintiffs petition being undenied.

16. That under Section 773 of the Judicial Code of the United States, the common law issues are triable to the jury under the Seventh Amend of said Constitution, and when issues of fact in civil cases are to be tried, the right of trial by jury is sacred and secure and may not be waived unless the attorneys of record, by proper stipulation, file same with the clerk or by an oral stipulation made and entered in open court, and of record, which is filed. This is also the provision of the Code, in substance, of Kentucky. And furthermore, the Act of April 30, 1936, and 1938 provide that it shall be unlawful for any person to ship or transport, or cause to be shipped or transported into the State of Kentucky any distilled spirits from points without the State of Kentucky, and without first having obtained a permit from the State Tax Commission so that payment of such taxes and permit fees as are required by law have been paid in advance and shall accompany said shipment; and furthermore, said act provides:

> "Distilled spirits manufactured in Kentucky, purchased and shipped outside of the State of Kentucky, and then re-shipped into the State of Kentucky, is subject to the 5c per gallon import tax."

BRIEF

These provisions are contrary to the decisions of the courts of Kentucky, and are contrary to Section

8, Article 1, of the Constitution of the United States. THIS COURT AS NOW ORGANIZED VERY RECENTLY IN A NUMBER OF DECISIONS SUSTAIN OUR CONTENTION:

Here, April 16, 1938, the court reached its conclusion, not because the petition *was insufficient* but because the claimant, in respect to the injunction had an adequate remedy at law. This left all other issues pending, and nothing was adjudicated except the question of adequate remedy, and that remedy was in the United States District Court by trial according to the principles of the common law which obtained in the State of Kentucky, under the rule of Erie Railroad vs. Thompson.

Derees vs. Costagua. 254 U. S. 170.

"If the court, on the merits, has not considered valid service of process, then the judgment which is rendered is *without jurisdiction of the person,* such as can be reviewed by direct appeal to the Supreme Court of the United States. This principle was re-stated, and previous cases cited as late as Merriam & Co. vs. Sallfield, 241 U. S. 226."

"Whether the district court has acquired jurisdiction over the person of defendant may be reviewed by this court, and direct appeal under Section 238, Judicial Code. *A motion to dismiss is not a final judgment and cannot be res-judicata.* Hence, if the decree of September 11, . . . , was not final as between appellant and Sallfield, it cannot be res-judicata. The suit for injunction was an equitable proceeding. The *suit to foreclose a mortgage is a common law proceeding.* The court may have had jurisdiction of either cause of action and not jurisdiction, of the other. *A judgment rendered without service on the owner of the res is not a valid*

judgment. No lien can be obtained in rem against the assets sought to be reached within the district without service on the owner or bailee in control of the assets."

Wells Fargo Co. vs. Taylor, 254 U. S. 175.

In regard to this question of service in the above case, Wells Fargo vs. Taylor, 254 U. S. 175, the court said:

"The Federal Court may enjoin a party of collecting a judgment obtained in a state court where its enforcement would be contrary to recognized principles of equity. If the suit was one to stay proceedings in a state court by injunction, and this was denied, the court rightly entertained the suit and proceeded to an adjudication of the merits, for the citizenship of the parties and the amount in controversy were within the jurisdictional requirements."

Marshall vs. Holmes, 141 U. S. 589, and Ex Parte Simons, 208 U. S. 144.

"Under Section 265 an injunction will lie to restrain the judgment obtained by fraud and without service on the party. The Circuit Court protected jurisdiction and awarded the relief sought."

Simons vs. So. R. R. Co., 256 U. S. 115.

In Rogers vs. Hill, et al, 289 U. S. 588, the court said in respect to the mandate:

"The plaintiff, on adequate showing might file additional pleadings and expand the issue and take other proceedings. The mandate directed further proceedings in accordance with the decision. On the coming down of the mandate, the District Court vacated the temporary injunction and dismissed the Bill of Complaint on the

merits. Plaintiff appealed, the Circuit Court of Appeals affirmed, 62 Fed. (2) 1079, citing its opinion, and this court granted plaintiff's petition for a Writ of Certiorari. Defendants, renewing contention made in opposition to the petition for certiorari, assert that the appellate court on the frst appeal determined in favor of defendants all the issues presented by the complaint, and maintain that, no application for certiorari having been made within three months after that decision, the only question that this court now has power to decide, is whether the mandate directed dismissal.

We are of the opinion that the mandate did not direct dismissal. The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal, for improvident allowance, violation of the rules of equity, or abuse of discretion."

National Fire Ins. Co. vs. Thompson, 281 U. S. 331, 338

Meccano Ltd. vs. John Wanamaker, 253 U. S., 136, 141

Smith vs. Vulcan Iron Works, 165 U. S. 518, 526.

"The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits, but the decree did not extend beyond mere reversal of the order from which the appeal was taken. It directed that mandate issue in accordance with this decree. The mandate commanded proceedings in accordance with the decision. A direction for proceedings, in accordance with the opinion makes it a part of the mandate. Gulf Refining Co. vs. U. S., 269 U. S. 125, 126. Here the mandate was to proceed, not in accordance with the *opinion* but with the *decision*. These words, while often loosely used interchangeably, are not equivalents. The courts decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. Houston vs. Williams, 13

Cal. 24, 27. Adams vs. Yazoo & M. V. R. Co., 77 Miss. 194, 304; 24 So. 200, 317; 28 So. 596. Craig vs. Bennett, 158 Ind. 9, 13; 62 N. E. 273. Coffey vs. Gamble, 117 Iowa 545, 548; 91 N. W. 813. The Judicial Code uses 'decision' as the equivalent of 'judgment' and 'decree.' 128, 238. As a mandate in the words of the decree was unquestionably sufficient to give effect to the ruling of the appellate court 'decision' may not reasonably be held to have been used for 'opinion.'

Moreover, if the court intended to *direct dismissal,* it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree, and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his Bills of Complaint. Wells Fargo & Co. vs. Taylor, 254 U. S. 175, 82. Metropolitan Water Co. vs. Kaw Valley District, 223 U. S. 519, 523. Mutual Life Ins. Co. vs. Hill, 193 U. S. 551, 553. Smith vs. Adams, 130 U. S. 167, 177. In any view of the matter, it is clear that the decree of the appellate court was not final, and that plaintiff, in order to have the validity of the payments considered here, was not *bound within three months* after entry to petition this court for a writ of certiorari."

Sprague vs. Ticonick Bag Co., 307 U. S. 166:

"As between solicitor and client, such allowance are appropriate only in exceptional cases, and for dominating reasons of justice, but here we are concerned solely with the power to entertain a petition. The district court deemed itself powerless because foreclosed by the mandate. It could not consider the questions which the mandate laid at rest. While the mandate is con-

trolling as to matters within its compass, on the remand the lower court is free, as to other issues."

In Re. Sanford Fork & Tool Co., 160 U. S. 247

Ex-Parte Century Indemnity Co., 305 U. S. 354.

"Certainly the claim as between solicitor and client-costs was not directly in issue in the original proceedings. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court, would be implied only if the claim for such costs was necessarily implied in re-claim in the original suit, and its failure to ask for such costs, and impliedly covered by the litigation. The taxable costs we hold was not impliedly covered by the original decree and by mandates, and that neither constituted a bar to the disposal of the petition below on its merits. The decision of the Circuit Court of Appeals must fall, and must be reversed, so that the district court may entertain petition for reimbursement in the light of the appropriate equitable considerations. The expiration of a term of court in no way affects the petition of the district court to make any act or to take any proceeding in any civil action which has been pending before it. Lacking jurisdiction to review the merits on the appeal, taken under section 3 of the act of August 24, 1937, this court vacates the decree below and remands the case to the district court for further proceedings to be taken independently of that section."

Jameson vs. Morganthau, 307 U. S. 171.

Sec. 57 Judicial Code-Title 28. provides for proceeding under lien in U. S. Court. Trustee must be made party. Sec. 238 Judicial Code provides for appeal where no proper service is had. Central Distributing Co., Inc., was not served nor was J. W. Kohn, et al, in attachment suit, nor was Harry Bayer, Trustee, so we have

the ground for Writ here, because there can be no appeal where there is no jurisdiction of party, and here there was neither, as petitioner alleges; so the Kentucky Code section 24 provides the party in interest MUST be made a party. Equity issues must be disposed of first.

Union Pac. R. R. vs. Syas, 246 F. 561-6.

"A single taxpayer even tho' a non-resident may bring a suit on behalf of himself and all others similarly interested, amounting to a large number of persons to receive back money illegally exacted for taxes."

Orear case—23 Law Reporter (1912)

Com. vs. Scott—80 Kentucky 498

112 Kentucky—252 Com. vs. Wiggins

92 Kentucky—48 Oswald vs. Morris

Comsrs. vs. Weiss—269 Kentucky—554

Blair and Carlisle vs. Turnpike Co. 157 Kentucky (also 4th Bush).

Fordson Coal Company case—249 Kentucky —498 7 Fed - (2) 117

Burchett vs. Clarke—109 S. W. 888 (Kentucky)

90 ~~198~~ Kentucky—~~589~~ 556 - Randolph vs. Lampkin

La Pointe vs. O'Malley—2 N. W.—632

Murphy vs. O'Reilly—263 Kentucky.

25 Ky. Code - Whaley vs. Com. 615.W.35

17. Your petitioners join in the petition of the Central Distributing Co., Inc. and make its said petition a part of this petition, supplemental to the issues arising on this petition, and the exhibits attached to its said petition for Certiorari, they also make exhibits to this petition and a part of this petition.

Wherefore, they pray that a writ of Certiorari be issued to the Honorable Sixth Circuit Court of Appeals, and to the Honorable Xen Hicks, its presid-

ing judge, and to the honorable Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky, by and through the said Sixth Circuit Court of Appeals, on orders from this court, and that the decree entered on April 16, 1938, in the city of Louisville, be vacated and set aside, and that the order of the said Honorable Mac Swinford, made in Chambers, on the 27th day of February, 1940, be vacated and set aside, and that the mandate of this court, entered at the October Term of 1939, be modified, and a direct order issue to the United States District Court for the Eastern District of Kentucky, so that the merits of this cause may be tried, as provided by law, and that to a jury, there be submitted all controversive issues of fact for proof; otherwise, that the United States District Court be required to enter judgment thereon, and that the action proceed ex-parte in respect to James W. Martin and the Commonwealth of Kentucky, and that they be adjudged in default after twenty days from when this action was filed in the United States District Court for the Eastern District of Kentucky, March 16, 1938. All of which is respectfully submitted.

HARVEY H. SMITH

Attorney for Plaintiffs,
Covington, Kentucky
and Cincinnati, Ohio.

Geo S Whiteman

AFFIDAVIT

STATE OF KENTUCKY
COUNTY OF CAMPBELL SCT.

Harry Bayer deposes on oath and says that he has read the foregoing petition for a Writ of Certior-

ari, and that the facts alleged and contained therein are true to the best of his information and belief and that he is the Trustee above referred to and representative of the Plaintiffs-Petitioners.

HARRY BAYER.

Subscribed and sworn to before me this 22nd day of May, 1940.

Elsie M. Dewald, *Notary Public.*

My commission expires 10-29-40.

NOTE: (We respectfully add that this petition be consolidated with that of the Central Distributing Co., Inc., filed this day for the same purpose in the same cause, and be considered with their application for the Writ of Certiorari).

Supreme Court of the United States

October Term, 1940

No. 333

Brief for Petitioners

— on —

PETITION FOR WRIT OF CERTIORARI

CENTRAL CO., Defendant

J. W. KOHN, M. S. KOHN and J. W. KOHN, Administrator of the Estate of CARRIE KOHN,

Petitioners

vs

THE HONORABLE MAC SWINFORD, Judge of the United States District Court for the Eastern District of Kentucky, and the HONORABLE XEN HICKS, Presiding Judge of the Circuit Court of Appeals in and for the Sixth Circuit, and the respective Courts:

Respondents

In the case of:

J. W. KOHN, et al, vs J. W. MARTIN, et al.

Issues examined and Brief and Record presented by: GEORGE E. WHITMAN, Attorney appearing for undisclosed assignors, not parties and Central Distributing Co., Inc.

I respectfully move an allowance of this brief and record as a part of the action as above styled.

HARVEY H. SMITH,

Attorney for Petitioners,
Covington, Ky., and
Cincinnati, Ohio.

(,That portion of this brief which refers to the Exhibits present the important files of the United States Circuit Court of Appeals for the Sixth Circuit)—All quotations in substance.

INDEX TO BRIEF—STATUTES and DECISIONS

UNITED STATES

KENTUCKY STATUTES AND CODE

DECISIONS

STATEMENT OF JURISDICTION AND INDEX TO POINTS IN THE PETITION

1 The Three Court judgment of dismissal rendered at Louisville April 16, 1938, is void for the following reasons:

(a) The court could render no judgment out of the Eastern District.

(b) The court decided that petitioners had an adequate remedy at law. (Single Judge denied it).

(c) This action had precedence of the state suit.

(d) Must be rendered by single Judge.

(Paragraph 1, page 1 and 2)

2 United State District Court for the Eastern District had [redacted] jurisdiction.

(a) No service on the Central Distributing Company, Inc.

(b) No service on the trustee.

(c) Trustee not a party to the action.

(d) Franklin Circuit Court was without jurisdiction. (prison penalty).

(Paragraph 2, page 3)

3 (a) State could not attach assets in the hands of a trustee under Kentucky law.

(b) Summons issued to service agent not served.

(c) Import taxes violate Article 1, Section 8, 14th Amendment, and Article 3, of the Bill of Rights of Kentucky.

(d) Mortgage foreclosure of $3000 or more must be adjudicated or there is a denial of due process and an impairing of contract rights.

(Paragraph 3, page 4)

4 (a) The consumers' tax attempted to be collected violates sections 171, 172, and 174 of the Constitution of Kentucky, and Article 1, Section 8, of the United States Constitution

(b) State auditor must be a party to the action. (145 Kentucky Statute).

(c) Foreclosure the main action—injunction plaint incidental.

5 The tax act of 1936—April 30—controlled tax and controlled parties to the action, which was the auditor, not the revenue commissioner (see 112—1—5, Kentucky Statutes). (Sec 10, 1934 Acts).

(Paragraph 5, page 5)

6 Denial of Jury—USCA 780. Rule 25.—Jurisdictional in Campbell County, not Franklin County.

(Paragraph 6, page 6).

7 Motion for judgment April 11, 1938.

(Paragraph 8, page 7)

8 Judgment at Louisville void.

(Paragraph 9, pages 7 and 8)

9 No findings of fact.

(Paragraph 11, page 8)

10 Collection of penalties ceased under repeal of the Act of 1934. (Paragraph 12, pages 8 and 9)

11 Act of April 30, 1936 and 1938 void. (Unconstitutional.) (Paragraph 13, page 9)

12 Refusal of the United States District Court to examine jurisdiction or hear a jury trial. (Paragraph 14, page 9)

13 Denial of due process, denial of appeal, denial of mandamus, refusal to docket and try the issues, denial of due process and equal protection of the laws; refusal to strike the name of J. W. Martin, and attorneys, resigned officer, denial of due process. (Paragraph 15, page 10)

14 Denial of jury trial under Judicial Code, Section 773, on controverted issues. Denial of equal protection of the laws of Kentucky. Section 20, 509 Code. (Paragraph 16, page 11)

15 Double collection of import taxes—contrary Kentucky Law and Article 1, Section 8. (Paragraph 16, page 11)

BRIEF

Authorities on page 12, section 238, concerning writ of Certiorari. On pages 12, 13, 14, 15, and 16 are the authorities showing that the judgment of April 16, 1938, is void as to the merits, and merits must be tried.

On page 17 are citations showing the right of a single taxpayer to collect either as assignor or assignee or both or one for all.

Page 18, Prayer.

Substitution of revivorship. If none in six months, judgment void. United States Rule 25. Not made within twelve months, judgment void; if entered without revivorship, void. (Ky.)

Asher vs. Fordson Coal Co., 249 Ky. 498.

Fordson Coal Co. vs. Jackson, 7 Fed. (2) 117.

Attorneys of record could not appear—not attorneys for auditor. Sec. 10, Act of 1934. 145—112 Ky. Statutes.

SECTION OF THE JUDICIAL CODE U. S. A.

Judicial Code, 238.
Annotated, 345.
Judicial Code, 237.
Annotated, 344.—5.
Judicial Code, 57.
Annotated, 118.

Digest of Brief---Record

1. The U. S. District Court had no jurisdiction to render judgment of dismissal in Louisville, Aug. 16th, 1938. Business of $870,000 destroyed by seizure. (Annually).

2. The cause of action ceased as to the defense of the action, because, the action should have been defended by the Auditor, not by Martin, Revenue Commissioner of Kentucky.

3. And if defended by Martin his defense ceased July 1st, 1939, by resignation, and no revivor was ever made.

4. Therefore Summary Judgment should have been sustained.

5. If by chance Martin, Revenue Commissioner was held a party, the merits of the action have never been determined. This right is present and these issues remain in the cause.

6. Any judgment on the merits without jury trial is void on common law issues, and so here, where jury was demanded under Kentucky Statute.

7. Motion for judgment, April 11, 1938, must be passed on, and no pleadings can be filed or action taken until it is passed on.

9. The only issue now before the court is the petition, with motions for judgment, summary judgment and trial of damage issue. All issues stand admitted.

10. The original suit in the state court, was without jurisdiction of the Res, and Sheriff is liable on his bond for attachment. Because the Franklin Circuit Court had no jurisdiction of the subject matter or parties, no officer or agent required by Kentucky Code was served.

11. Harry Bayer, Trustee was never served, and not a party to the action; being a necessary party, the orders of the court are void as to the property-no attachment can be run against property in the hands of a bailee or trustee in Kentucky. Sec. 299 Ky. Code.

Issues Deemed Conclusive by attorney appearing for Central Distributing Co.
Respectfully submitted,

GEO. E. WHITMAN,
Attorney, Cincinnati, Ohio.

SUPPLEMENTAL BRIEF FOR WRIT OF CERTIORARI

RECORD OF LAW IN CONNECTION WITH STATEMENT OF JURISDICTION AND NECESSARY RECORD TO DETERMINE THE ISSUES (Combined)

1. *Jurisdiction.*. Section 237-8 and 240 A, Judicial Code.

Right of substitution of parties defendant or plaintiff. *Rule* 25, *Supreme Court Rules* (*d*). Act of February 13, 1925, Chapter 229, Section 11. Title 28, Section 780 U. S. C. (Six months clause).

2. Findings necessary for court to make. Rule 52. Certified to the Appellate Court under Rules 75 and 76. *None Made.*

Mandatory. Humphries vs. Helgerson, 78 Fed. (2) 484.
Interstate Circuit vs. U. S., 304 U. S. 55.

3. Foreclosure of Mortgage. Section 57, Judicial Code, Title 28, provides that the United States courts may enforce mortgage liens.

Trustee must be made party, or bailee, under the laws of Kentucky. Section 299 Code.

Section 238, Judicial Code 237-8-240-a, provides for appeal by certiorari. Default for 6 months pleading. Rule 60.

Determination of an injunction without the trial of issues on the merits makes a judgment void on the merits, and denies the right of trial by jury, impairs the obligation of contracts, denies due process of law, and the equal protection of the laws. National Fire Insurance Co., vs. Thompson, 253 U. S. 331, 338; Meccano, Ltd., vs. John Wanamaker, 235 U. S. 136, 141; Smith Vulcan Iron Works, 165 U. S. 518, 526.—204 U. S. 632.—(Smithers vs. Smith).

4. A mandate without directions to determine the merits does not *permit the district court to deny hearing on the merits.* Gulf Refining Co. vs. U. S. 269 U. S. 125, 126; Houston vs. Williams, 13 Cal. 24, 27; Adams vs. Yazoo & M. V. R. Co., 77 Miss. 194, 304; Craig vs. Bennett, 158 Ind. 9.

5. *Order dismissing on application for injunction is not a determination of the merits.*

NOTE: SEE RECORD FOR GROUND OF ARGUMENT. Petition C. Co. 47.

Wells Fargo Co. vs. Taylor, 254 U. S. 175

Metropolitan Water Co. vs. Kaw Valley, 223 U. S. 519

Mutual Life Ins. vs. Hill, 193 U. S. 551, 553.

NOTE:—(Pet. C. Co. refers to Central Co. page).

Smith vs. Adams, 130 U. S. 167, 177.

Sprague vs. Ticonick Bag Co., 307 U. S. 166.

Ex-Parte Century Indemnity Co., 305 U. S. 354

In Re. Sanford Fork & Tool Co., 160 U. S. 247

Witers vs. Sowles, 33 Fed. 590.

Barry vs. Edmunds, 116 U. S. 565.

Chandler vs. Neff 298 F. 518.

I. C. R. R. vs. Com. (1) Fed. (2) 805

Marshall vs. Holmes, 141 U. S.

Ex Party Simons, 208 U. S. 144

Simons vs. So. R. R. Co., 256 U. S. 115

Rogers vs. Hill, et al, 289 U. S. 588

DeRees vs. Costaguta, 254 U. S. 170

Merriam & Co. vs. Sallfield, 241 U. S. 226

Swift vs. Inland Navigation Co., 234 Fed. 375

O'Keiffe vs. New Orleans, 273 Fed. 560 and 280 Fed. 92

City vs. McLaughlin 9K Fed. (2) 390.

6. Defendants' motion to dismiss transfers the case to the law side, if sustained.

Collins vs. Bradley Co., 227 U. S. 199

Brown vs. Kassover, 255 Fed. 806

Edward Lumber Co. vs. Stone, 258 Fed. 782

The equitable issue must be disposed of first, and then the common law issues.

Scott vs. Neely,, 140 U. S. 106

Union Pacific Co. vs. Syas, 246 Fed. 561

National Bank case, 260 U. S. 235

Liberty Oil case, 260 U. S. 236

Albert vs. Basconi, 245 Fed. 149

Investors Ins. Corp. vs. Luikary, 5 Fed. (2) 793

The *last twenty cases* were presented to the United States District Court and the Circuit Court of Appeals.

7. Judgment of the United States District Court is void unless it determines the issue of jurisdiction in the State Court and makes findings for said jurisdiction. Merrian & Co., vs. Sallfield, 241 U. S. 226.

No service of summons in this case.

Duncan vs. Wickliffe, 61 Ky. 118.

Hearne vs. Hander, 56 Ky. 479, Section 1358

Carrol's Code of Ky., Sec. 76.

Case vs. Mill—156 Ky. 628

Hughes vs. Hardesty 13 Bush 364

Ky. Statute Sec. 470, 472, 2554, Code 39.

Smith vs. Dunghey 178 Ky., 702

Ernst vs. Pike 232 Ky. 680.

Summons must be issued and served before attachment is valid. Sec. 2524 Carroll's Statutes.

Summons must be filed and served, and attachment cannot be filed until at or after the commencement of an action. Sec. 39, Code of Practice of Kentucky; Redmond vs. Underwood, 101 Ky. 190; Nolle vs. Thompson, 60 Ky. 123.

An action shall be deemed to be commenced at the date of the summons, otherwise not at all. Sec-

tion 2554 Carroll's Statutes; Code 367; Cape vs. Cape, 136 Ky. 687.

Section 39 and 194 of the Code provides that attachment cannot issue before summons.

Summons must be served on an officer of the corporation or the service agent.

Hall & Head vs. Grogan, 78 Ky. 11

Duncan vs. Wickliffe, 61 Ky. 118

Scott vs. Dungey, 17 B. M. 70

Simpson vs. Antrobus, 260 Ky. 641

There is no action pending until a summons is served.

Casey vs. Newport Milling Co., 156 Ky. 623

L. & N. vs. Napier, 230 Ky. 323

Shepherd vs. Moore, 1 Medcalfe 97

Cowherd vs. Hardin, 7 Ky. 217

McCord vs. Barker, 8 Ky. 790

Henry Farris, Exrs. Emily Rowland, 8th Ky. Opin. 886

Mattingly vs. Sims, 8th Opin. 167

Sally vs. Brown, 8th Opin. 887

Green vs. City of Covington, 83 Ky. 416

Moore vs. Harrod, 101 Ky. 248

No summons was served, and the attachment was not served on an officer of the corporation or service agent. *The United States District Court refused to examine this question.*

7. *Void Order.* THE ORDER OF THE COURT TRANSFERRING THE CASE FOR HEARING BE-

FORE THREE JUDGES IN THE CITY OF LOUISVILLE RENDERED THE JUDGMENT VOID, Apr. 16, 1938.

Case vs. United States, 14 Federal (2) 510

In Re Briggs, 15 Fed. (2) 88

Bland vs. Kenamer, 6 Federal (2) 130

Section 15, Judicial Code II

Special Judge may be designated "within the territory" of the regular judge, section 18 Judicial Code (amended 14). To decide all such matters submitted to him "within such district" (Judicial Code 18).

Judicial Code 83, defines the limits of the district to be in certain named counties composing district.

Revised Statutes, U.S. section 581, defines power, not judicial out of the district.

The universal decision is that courts have no power beyond their districts and Judges none, except on orders of the Supreme Court, which limits such special judges to the district where sent.

The Judgment of dismissal was void, and the order removing the cause to the western district at Louisville for hearing is a non jurisdictional void order-hence no final judgment even on determining the injunction was rendered.

TAXPAYERS MAY SUE FOR ALL (In Ky.)

8. The Kohns might sue for all of the taxpayers without naming them, in Kentucky, under the Kentucky decisions. 61 S. W. 35.

In the case of Whaley vs. the Commonwealth (a non resident) the Court of Appeals held Whaley could sue for all the taxpayers in Fleming County in the same tax paying class.

Orear Case, 23 Law Reporter (1912)

Com. vs. Scott, 80 Ky. 498

Commonwealth vs. Wiggins 112 Ky. 252 (one sued for all)

Oswald vs. Morris 92 Ky. 48

Commissioners vs. Weiss, 269 Ky. 554

Blair and Carlisle vs. Turnpike Co. 157 Ky. also 4th Bu

Fordson Coal Company vs. Jackson 249 498

Burchett vs. Clarke 109 S. W. 888 (Ky.)

Randolph vs. Lampkin 90 Ky. 556

La Point vs. O'Malley, 2 N. W. 632

Murphy vs. O'Reilly, 263 Ky—

Assignments might be made after suit is brought under a different section of the Code where substitution was made for assignee who owned claim before suit.

(9) *The Act of* 1934. *Kentucky Alcohol Control Act-March* 17th.

This Act created the Central Distributing company and licensed it to sell whiskey as a beverage in violation of Amendment 7 of the Constitution (total prohibition under 18th Amendment).

Section 2 pg. 48 provides the taxpayers may sue, through its agent *the Auditor of the State* for illegal taxes collected in the "State or Federal Courts." Act 1934.

If the state sues an individual for taxes how is it? Section 10, defines: Act 1936, April 30.

> "On the failure of any person, liable therefor, to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall be deemed delinquent, and a penalty of 20 per cent on the amount of license tax due and the Auditor shall at once cause such proceedings for the collection of such license with such interest and penalties as may be provided for other collection of taxes."

Section 12; Auditor shall draw his warrant; Green book; penalties imprisonment section 22, 1934 Act.

10. The Circuit Court of Franklin County had no jurisdiction, and the Federal court could have none. Section 976 of Carroll's Stat.

Statute (limiting the jurisdiction of the court to civil actions to enforce penalties). Public offense of which the only punishment is a *fine* may be prosecuted by penal action under Section 11, of the Criminal Code in the manner for civil actions.

The action here to collect penalties was by James W. Martin, *the wrong party,* Section 10 of the 1934 Alcohol Beverage Control Act (original printing) provided for a penalty of one year imprisonment in addition to the fine. It became a criminal penalty enforceable where the offense was committed, the sale of unstamped liquor in Campbell County.—*The sale of unstamped liquor, same act.*

An action which requires a plea of "not guilty" (as in this case); is not such an action as may be brought under Section 11 of the Criminal Code. See

Section 699 Carroll's Code, Title 1, and authorities, as follows: (No jurisdiction in Franklin Circuit Court).

L. & N. vs. Commonwealth, 112 Ky. 640

Com. vs. Avery, 77 Ky. 625

Morrell vs. Com., 129 Ky. 739-40

Helm vs. James, 129 Ky. 239

Com. vs. Long, 30 S. W. 629

Com. vs. Building Loan 30 S. W. 627

"The offense consisted of carrying on a business in violation of law—the action accrued where the act was done, and the penalty must be prosecuted there."

Morrell vs. Com., 129 Ky. 740.

A plea of "not guilty" instead of an answer must be filed.

Com. vs. Avery, 77 Ky. 625

L. & N. vs. Com., 112 Ky. 640

Section 4028-9, Carroll's Code

Section 4261 — All penal actions must be prosecuted by the Commonwealth's Attorney, (not by the revenue officer).

If a criminal penalty—No jurisdiction.

11. No suit can be brought in a county except where the *service agent resides,* or may be served on an officer at its place of business.

C. & O. vs. Heath, 87 Ky. 651

Sweet vs. Tuttle, 14 N. Y. 465

L. & N. vs. Grimes, 50 Ky. 220

L. & N. vs. Baume, 128 Ky. 90

Carroll's Code, section 71-72.

3 Ky. Law Reporter, 193, (penalty must be heard by the court or due process is denied).

An attorney in Kentucky is jointly liable with his client for procuring an attachment without jurisdiction in the court.

Wood vs. Ware, 50 B. M. 550-8

Cooley on Torts 349

16 Cal. 83—Natoma Water Co. vs. Parker

13 S. W. 87—Finley vs. St. Louis R. R. Co.

12. *Summary Judgment.* The summary judgment in this case where there is no service and no jurisdiction must be sustained by the court. Rule 56.

1. Adjudication that Common law remedy existed is a stare-decisis bar in *Estoppel.*

Sub. b.: "The party asserting a counter claim at any time may move with or without supporting affidavits, or a summary judgment in his favor, and to all or any part thereon."

Sub. d.: "The court must examine the pleadings, interrogate counsel and shall thereupon include the extent what is in controversy. The trial shall be conducted accordingly."

Seagram's Distillers Corp. vs. Monas, 6 U. S. Law. Rep. 370 and cases there cited.

Aetna Life Ins. Co. vs. National Dry Dock Co., 230 Appeals Division 486.

245 N. Y. S. 365

13. *In Federal Courts, in Law issues,* summary judgment is applied. Judgment for the recovery of money—judgment on debentures—judgment on bonds.

U. S. C. 28 — 784

If the defendant is in default, claimant may have a summary judgment sustained. Judgment may be sustained in summary action for part of demand, when there is no dispute, and the balance of demand may be continued for determination.

N. Y. Civil Practice, rule 114 (from which present Federal rule was taken).

If the court fails to sustain *summary judgment* when parties are in default, reversible error.

If the record shows default beyond the statutory limit of six months, the court can grant no relief and the summary judgment may be *sustained as a matter of right..* (Rule 60).

14. *MERITS SURVIVE trial* on injunctive RELIEF, and *judgment void here for want of parties defendants.*

Kappell Industrial Car Co. vs. Portalis & Co., 205 N. Y. 144

Lowell vs. Lowell, 265 N. Y. 197

Lockhart vs. Leeds, 195 U. S. 127

Buffalo Specialty Co., 217 Fed. 91

Clifton vs. Tomb, 21 Fed. (2) 898

Irving vs. Wright, 219 U. S. 229

298 Fed. Rep. 518

Collins vs. Miller, 252 U. S. 364

Stromberg vs. Arnson, 239 Fed. 891

Louisville Navigation Co. vs. Oyster Commission, 266 U. S. 99

Chicago vs. Kendall, 266 U. S. 95

Norfolk Turnpike Co. vs. Va., 225 U. S. 264

SUMMARY

Auditor Must Sue: Attorney General Must Act.

15. *Improper Parties*: The license tax is in reality an excise tax, the right to do something. The Auditor must collect for license taxes, privilege taxes. The 5 per cent import tax, the state contends is an excise tax, and the $1.04 per gallon, the state claims is another excise tax, the privilege of selling to a retailer by a wholesaler, who must pay the tax. The Auditor must collect all license taxes. Motion of Petitioners April 11th, 1938 ,and Motion for judgment of February 9th, 1940, must be sustained. No answer or reply or other pleading in denial of merits; order dismissal does not effect the merits, nor strike the petition.

QUESTIONS UNDER THE LAW

The questions therefore under any penalty where there is or is not a penalty of imprisonment, must be submitted to a jury for trial. Does he owe the tax? Can he be penalized? Does he answer? Certainly he does not—he files his plea of NOT GUILTY. How then could a penalty be imposed without a hearing and without a trial, as provided by law? Denying such jury trial the court of course denied a due pro-

cess trial because a jury trial on issues of fact of common law nature must be had, or no due process is awarded—Section 7, Constitution of Kentucky, and this right is a 14*th Amendment guarantee.*

THE PENALTIES WERE BARRED

Under this monstrous legislation, three excise taxes must be collected—5 per cent for the privilege of manufacturing, 5 per cent if the liquor in travelling, must come into Kentucky to its destination. Now then if it is shipped out of the State and stored, and then shipped back into Kentucky under this law it must pay $1.04 per gallon—the wholesaler—another excise tax. To that, always the gallon pays two excise taxes, and sometimes *three excise taxes.*

16. Here in this alleged tax the Commonwealth was collecting, *three taxes* on a part of this whiskey. This is what a trial is for in the Federal Courts, and this is what was denied by this Federal trial Judge, by denying a trial on the merits. Some justice; this Honorable Court must allow, in a great free country.

But we think the law, as decided by the Sixth Circuit:

> Illinois R. Co. vs R. R. Commission of Ky., 1 Fed. (2) 805:
>
> "Since we think the requirements of Section 266, Judicial Code (Comp. St. 1243) have been met by the hearing which has been had, and by the filing of this memorandum approved by the three judges, the order presently continuing the restraining order as herein directed, and the preliminary injunction to issue if there is no further showing to be made, will be entered by the District Judge of this district, sitting alone. *He will also pass upon the motion to dismiss the bill.*

> The court as now constituted may consider the grounds of such a motion as they *bear* upon the motion for *injunction,* but can make no order *except to grant or refuse the injunction, or restraining order."*

The order of dismissal here is signed by three judges out of the district.

17. *The Court of Appeals of Kentucky* in Asher vs Fordson Coal Co., 249 Ky. 498, and the Sixth Circuit Court of Appeals, in Fordson Coal Co. vs Jackson, settle the invalidity of the judgment of the court refusing to docket this cause and try out the merits, Martin having been detached from the Internal Revenue Commissioner's office. The one year time having expired voids the judgment in Kentucky, and six months having expired at the time the United States District Court for the Eastern District of Kentucky refused to docket the cause. The Kentucky Court of Appeals and the Circuit Court of Appeals for the Sixth Circuit are agreed.

> Kentucky Decision; 501-10 Code makes Judgment void. Ashen Case.
>
> "However, it appeared that the judgment in that case (relied upon by the Court of Appeals) had been rendered before the substitution was made, and, under the conclusion that no valid proceeding on the merits could be had until the order was entered (the order of revivorship), writ of error was dismissed, because the judgment was void. It was stated that the case below stood undisposed of—as shown above, the substitution was made in this case before the judgment (while in the Sixth Circuit Court of Appeals the substitution was made after judgment, hence void)."

It is unnecessary to cite authorities on this issue, both the Federal statute and Kentucky Code are sufficient to make any order void thereafter rendered.

18. *Intervention* and service of *Harry Bayer as Bailee or Trustee is a matter of right*: He was a necessary party, Rule 23 sub. (a and I).

Control by the court of the property is in itself sufficient ground for intervention. If the party is adversely affected by disposition of the property then intervention becomes a matter of right in the trustee.

Louisville Trust Co. vs. Louisville Ry. Co. 174 U. S. 674.

Sec. 777 U. S. C. Title 28—judgment must be on merits, a hearing fully.

The trustee may maintain an independent suit, but is not bound by a Judgment to which he is not a party. Property in his control (Kentucky Code): Cannot be seized.

Wichita Ry. Co. vs Public Utilities, 260 U. S. 48.

The rule in the Federal Court applying here is Rule 13, sub. (h) and rule 38.

19. Action for taxes authorized by Act of 1934-36, section 10.

> "A single taxpayer even tho a non resident may bring suit for taxes in Kentucky, for himself or for all others."
>
> Sec. 20-28 Carroll's Code.
>
> Orear case, 23 Law Reporter 1912.

Com. vs Scott 80 Ky. 498.

Com. vs. Wiggins 112 Ky. 252.

Oswald vs Morris 92 Ky. 48.

Commissioners vs Weiss 269, 554.

Newcomb vs Newcomb, 108 Ky. 589. This may be done independent of a special Act.

There was no jurisdiction in the court to entertain a motion from J. W. Martin. Attachments and injunctions are incidental proceedings under the Code and Statute of Kentucky, and if there is not a *main cause of action* there is no jurisdiction in the Court to enforce these incident proceedings.

"Adequate remedy" is defined in words and phrases as an action at common law on the merits.

See Record, Judgment, April 16, 1938, at Louisville, and order Feb. 27, 1940, denying trial.

Respectfully submitted,

GEO. E. WHITMAN.